Supreme Court, U.S.
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IN THE

Supreme Court of the United States

INSTA-MIX, INC., UMIX, INC., UMIXPRODUCTS, INC., UMIX SPORTS, INC., UMIXPRO, AND UMIXBABY,

Petitioners,

v.

LUV N' CARE, LTD.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court should resolve a significant and entrenched circuit split and hold that the Fifth Circuit erred in applying the "stream of commerce" test described in a plurality opinion in *Asahi Metal Industry Co., Ltd. v. Superior Court of California*, 480 U.S. 102 (1987), and thereby concluding that petitioner's sales of its product free and clear to a retailer who directed that product into the forum state were sufficient to subject petitioner to personal jurisdiction, even though numerous other circuits and states apply a "stream of commerce plus" test set forth in a different plurality opinion in *Asahi*, under which petitioner plainly would not have been subject to personal jurisdiction in the forum state.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, the following parties are respondents in this proceeding:

Joe P. Guerriero
Morris E. Cohen
Nouri Edward Hakim
Jack Hakim
Joseph Hakim
All similarly situated persons.

The following parties are affiliated with petitioners in this proceeding:

Keith Cross
Thomas M. Hayes
James Holley, Jr.

Petitioner Insta-Mix, Inc. is a Colorado corporation. It does business under the name Umix, Inc., and has done business under the names Umix, Inc., Umixproducts, Inc., Umix Sports, Inc., Umixpro, and Umixbaby.

There is no parent corporation or publicly held corporation that has a 10% or greater ownership interest in Insta-Mix, Inc.

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PETITION FOR CERTIORARI

Petitioner Insta-Mix, Inc. ("Insta-Mix") respectfully seeks a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 438 F.3d 465 (App. 1-18). The order of the district court accepting the magistrate judge's recommendation to grant petitioner's motion to dismiss for lack of personal jurisdiction (App. 19-20) was not reported. The magistrate judge's recommendation to grant petitioner's motion to dismiss for lack of personal jurisdiction (App. 21-27) also was not reported.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides that "[n]o State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law."

JURISDICTION

The judgment of the court of appeals was entered on January 25, 2006. App.1. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

INTRODUCTION

Circuit Judge DeMoss urged the Court to grant certiorari, stating that "I hope Insta-Mix will apply for a writ of certiorari and I urge the Supreme Court to take up the minimum contacts issue and resolve it and the increasing

circuit divide with clarity." App. 17. The question presented is whether courts have personal jurisdiction over a defendant who places products in the stream of commerce and expects that they will or may reach the forum state but who does not purposefully direct activities toward the forum state. The courts of appeals are badly split over this issue. At least three circuits use the sparse "stream of commerce" test first mentioned in dicta in *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980) and further refined in a plurality opinion in *Asahi Metal Industry Co., Ltd. v. Superior Court of California*, 480 U.S. 102 (1987). On the other hand, at least four other circuits use the "stream of commerce plus" test discussed in another plurality opinion in *Asahi*, which requires that the defendant take purposeful action directed towards the state beyond merely placing an item into the stream of commerce.

The *Asahi* opinions have left the federal and state courts badly split as they grapple with an issue that impacts due process and state sovereignty. In the 26 years since *World-Wide Volkswagen* and the 19 years since *Asahi*, a sea change has occurred in the world of commerce. This change has resulted largely from widespread use of the Internet, along with the rise of the global economy and the greatly increased market presence of national retailers like Wal-Mart. Now, even the smallest of domestic and foreign companies have access to our national retail markets through the Internet and through sales to national retailers.

Contests over personal jurisdiction based upon sales to third parties recur frequently, and there is great need for a national, uniform rule. The fact that some circuits (and states) are defining the limits of personal jurisdiction under the Constitution more narrowly than are other circuits (and states) means either that some courts are exercising jurisdiction that they lack or that other courts are abdicating

their responsibilities by failing to properly exercise their own jurisdiction. In any event, the lack of uniformity subjects those entities selling products for nationwide distribution to significant uncertainty regarding a fundamental and, unfortunately, all too pressing business concern – whether they may be haled into court in any or every jurisdiction in which their product is sold, regardless of whether it is their purpose to sell it there. This uncertainty has worsened significantly in the almost two decades since *Asahi* was decided, such that commentators now refer to personal jurisdiction after *Asahi* as a "quagmire," with "confusion and disagreement [being] the order of the day."[1]

The Court should now resolve this conflict.

STATEMENT OF THE CASE

Insta-Mix is a Colorado corporation located solely in Colorado Springs, Colorado. It makes and sells innovative infant and toddler feeding products. This case involves a feeding bottle with a patented bottom freeze plug designed to keep liquid cool. Insta-Mix advertised and sold the bottles on its website and shipped them to certain states (not including Louisiana). In addition, it sold its bottles to major retailers. The vast majority of its bottles were

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[1] *E.g.*, Robert J. Condlin, "Defendant Veto" or "Totality of the Circumstances"? It's Time for the Supreme Court to Straighten out the Personal Jurisdiction Standard Once Again, 54 CATH. U. L. REV. 53, 147 (2004) ("confusion and disagreement"); Andrew Kurvers Spalding, Note: In the Stream of Commerce Clause: Revisiting *Asahi* in the Wake of *Lopez* and *Morrison*, 4 NEV. L.J. 141, 155 (2003) ("quagmire"); Diane S. Kaplan, Paddling Up the Wrong Stream: Why the Stream of Commerce Theory is Not Part of the Minimum Contacts Doctrine, 55 BAYLOR L. REV. 503, 586 (2003) (describing personal jurisdiction as being in a state of "confusion [and] controversy").

purchased by Wal-Mart, which sent 3,696 of those bottles to its own distribution center in Opelousas, Louisiana.

Wal-Mart ordered Insta-Mix products entirely through an electronic transmission system known as Electronic Data Interchange ("EDI"). It took delivery of and title to the shipments at the Insta-Mix dock in Colorado Springs. Wal-Mart then shipped the bottles to various distribution centers throughout the United States. While Insta-Mix could have ascertained Wal-Mart's shipment destinations, it did not, and it did not otherwise direct any of its activities at Louisiana.

An intellectual property dispute arose between Insta-Mix and Respondent Luv n' Care, Ltd. ("Luv n' Care") regarding the bottle. Luv n' Care filed suit against Insta-Mix in the United States District Court for the Western District of Louisiana for copyright infringement under 17 U.S.C. §101 et seq. and for unfair competition and federal trademark dilution under Sections 43(a) and (c) of the Lanham Act (15 U.S.C. § 1125 (a), (c)). The magistrate judge recommended dismissing the suit for lack of personal jurisdiction, concluding that "[s]imply placing [a] product in the stream of commerce is not sufficient to create personal jurisdiction even if it were foreseeable that the product might end up in Louisiana." App. 3. The district court accepted the magistrate judge's recommendation and dismissed the suit without prejudice. *Id.* at 20-21.

In reviewing the lower court's order, the Fifth Circuit concluded that Insta-Mix's "only contact with Louisiana [was] its sales of items to Wal-Mart." *Id.* at 3. But the court reversed and held Insta-Mix subject to personal jurisdiction in Louisiana under the "stream of commerce" test applied in that circuit. In his specially concurring opinion, Judge DeMoss stated this case "reveals the flaws in" the "stream of

commerce" test. He further stated that the minimum contacts test is in a "state of complete disarray." *Id.* at 16. According to Judge DeMoss, this decision creates a "Wal-Mart exception" that "render[s] any small company that sells a product to Wal-Mart subject to suit in any state in the nation in which Wal-Mart resells the company's products." *Id.* at 17. Notwithstanding his concurrence, he agreed with the Fourth Circuit, which stated that "[t]o permit a state to assert jurisdiction over any person in the country whose product is sold in the state simply because a person must expect that to happen destroys the notion of individual sovereignties inherent in our system of federalism." *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 945 (4th Cir. 1994). Judge DeMoss pointed out that none of the "plus" factors under the *Asahi* "stream of commerce plus" test are present and that "[t]his result on this record defies principles of federalism and therefore presses for the repudiation of the 'stream of commerce' approach to personal jurisdiction." App. 17.

REASONS FOR GRANTING THE PETITION

1. Review by the Court Is Necessary to Resolve an Irreconcilable and Entrenched Conflict in the Courts of Appeal and the State Courts Regarding a Significant Issue of Federal Law

The conflict arises because some circuits (and states) have followed Justice Brennan's plurality opinion in *Asahi*, while other circuits (and states) have followed Justice O'Connor's plurality opinion in *Asahi*. Justice Brennan's plurality opinion followed the dicta in *World-Wide Volkswagen*, which stated that "[t]he forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum

State." *World-Wide Volkswagen*, 444 U.S. at 297-298. On the other hand, Justice O'Connor's plurality opinion concluded that "a defendant's awareness that the stream of commerce may or will sweep the product into the forum state does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State." *Asahi*, 480 U.S. at 112.

Asahi involved three separate opinions. Justice O'Connor's plurality opinion applied a "stream of commerce plus" test and concluded that the defendant did not purposefully avail itself of the California market.[2] *Asahi*, 480 U.S. at 112-13. Justice Brennan's plurality opinion applied the "stream of commerce" test and concluded that the defendant did purposefully avail itself of the California market but that this was one of the "rare" cases where exercising personal jurisdiction would not meet the constitutional standards for fairness. *Id.* at 116. Justice Stevens's opinion applied a different test and also found that this was one of the few cases where fairness required a finding of no personal jurisdiction.[3] *Id.* at 121.

The Fifth, Seventh, and Eighth Circuits all use the "stream of commerce" test from Justice Brennan's plurality

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[2] In any event, Justice O'Connor's opinion concluded that personal jurisdiction in California would not have comported with constitutional standards of fairness under the facts of the case. *Id.* at 114.

[3] Justice Stevens's test was limited to products liability cases and held that whether a court had personal jurisdiction would depend on "the volume, the value, and the hazardous character of the components." *See Commissariat a l'Energie Atomique v. Chi Mei Optoelectronics Corp.*, 395 F.3d 1315, 1321 n.6 (Fed. Cir. 2005) (discussing Justice Stevens's *Asahi* concurrence).

opinion.[4] *Ruston Gas Turbines, Inc. v. Donaldson, Co.*, 9 F.3d 415, 420 (5th Cir. 1993); *Dehmlow v. Austin Fireworks*, 963 F.2d 941, 947 (7th Cir. 1992); *Barone v. Rich Brothers Interstate Display Fireworks, Co.*, 25 F.3d 610, 613-15 (8th Cir. 1994). On the other hand, the First, Fourth, Sixth, and Eleventh Circuits all use "the stream of commerce plus" test from Justice O'Connor's plurality opinion.[5] *Boit v. Gar-Tec Products, Inc.*, 967 F.2d 671, 683 (1st Cir. 1992); *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 945-46 (4th Cir. 1994); *Bridgeport Music, Inc. v. Still N the Water Publ'g*,

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[4] There is some confusion over what standard the Eighth Circuit uses. *See* Richard M. Elias, *In Search of a Broader Stream of Commerce Theory: The Eighth Circuit Streams Past Inconsistencies in Favor of Equitable Results*, 67 Mo. L. Rev. 99, 112-15 (2002) (noting that the Eighth Circuit seems to have switched from stream of commerce plus to stream of commerce). Based on *Falkirk Mining Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369, 374 (8th Cir. 1990), the Fourth Circuit wrote that the Eighth Circuit uses the "stream of commerce plus" test. *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 945 (4th Cir. 1994). But based on *Barone v. Rich Brothers Interstate Display Fireworks Co.*, 25 F.3d 610, 615 (8th Cir. 1994), the Third Circuit wrote that the Eighth Circuit uses the "stream of commerce" test. *Pennzoil Prods. Co. v. Colelli & Assocs., Inc.*, 149 F.3d 197, 203 (3rd Cir. 1998). The cases since *Barone* have not cleared up the confusion, as some appear to use "stream of commerce plus," while others appear to use the "steam of commerce" test. *Compare Dever v. Hentzen Coatings, Inc.*, 380 F.3d 1070, 1075 (8th Cir. 2004) (appears to use stream of commerce plus), and *Stanton v. St. Jude Med., Inc.*, 340 F.3d 690, 694 (8th Cir. 2003) (same), *with Vandelune v. 4B Elevator Components Unlimited*, 148 F.3d 943, 948 (8th Cir.1998) (appears to use stream of commerce), and *Clune v. Alimak AB*, 233 F.3d 538, 543 (8th Cir. 2000) (same).

[5] There is also some confusion within the Eleventh Circuit regarding which test it uses. Although the Eleventh Circuit appeared to adopt the "stream of commerce plus" test in *Madara v. Hall*, 916 F.2d 1510, 1519 (11th Cir. 1990), a later case claimed that the Eleventh Circuit had not decided the issue. *Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534, 1548 (11th Cir. 1993).

327 F.3d 472, 479-80, (6th Cir. 2003); *Madara v. Hall*, 916 F.2d 1510, 1519 (11th Cir. 1990). Other circuits have simply refused to decide which test to apply. *See, e.g., Pennzoil Products Co. v. Colelli & Assocs., Inc.*, 149 F.3d 197, 207 n.13 (3rd Cir. 1998) (finding jurisdiction under both "stream of commerce" and "stream of commerce plus" tests).

State courts are also deeply split on this issue. The following fifteen states appear to use the "stream of commerce plus" test: Alabama, Arizona, California, Colorado, D.C, Florida, Kentucky, Maryland, Michigan, Mississippi, New York, Ohio, Pennsylvania, Vermont, and Virginia.[6] The following six states appear to use the "stream of commerce" test: Georgia, Idaho, Minnesota, North Carolina, West Virginia, and Wisconsin.[7]

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[6] *Ex parte Alloy Wheels Int'l*, 882 So. 2d 819, 823 (Ala. 2003); *Rollin v. William V. Frankel & Co.*, 996 P.2d 1254, 1257-58 (Ariz. Ct. App. 2000); *Carretti v. Italpast*, 101 Cal. App. 4th 1236, 1249-1250 (2002); *Union Pacific R..R. Co. v. Equitas Ltd.*, 987 P.2d 954, 957 (Colo. Ct. App. 1999); *Holder v. Haarmann & Reimer Corp.*, 779 A.2d 264, 273 (D.C. 2001); *Kin Yong Lung Indus. Co., Ltd. v. Temple*, 816 So. 2d 663, 666 (Fl. Dist. Ct. App. 2002); *Halderman v. Sanderson Forklifts Co., Ltd.*, 818 S.W.2d 270, 274 (Ky. App. 1991); *Hollingsworth & Vose Co. v. Connor*, 764 A.2d 318, 330-31 (Md. App. 2000); *Witbeck v. Bill Cody's Ranch Inn*, 411 N.W.2d 439, 448 (Mich. 1987); *Sorrells v. R & R Custom Coach Works, Inc.*, 636 So. 2d 668, 674 (Miss. 1994); *Schultz v. Hyman*, 201 A.D.2d 956, 956 (N.Y. App. Div. 1994); *Sherry v. Geissler U. Pehr GmbH*, 651 N.E.2d 1383, 1388 (Ohio Ct. App. 1995); *Graham v. Machinery Distribution, Inc.*, 599 A.2d 984, 987 (Pa. Super. 1991); *Dall v. Kaylor*, 658 A.2d 78, 80 (Vt. 1995); *Sutherland v. Robby Thruston Carpentry, Inc.*, 2005 WL 545543, *3 (Va. Cir. Ct. 2005).

[7] *Continental Research Corp. v. Reeves*, 419 S.E.2d 48, 52-53 (Ga. Ct. App. 1992); *Noss v. Avatar Technology, Inc.*, 2002 WL 32103156 at *9 (Idaho Dist. 2002) (No. CV 2001-1391); *Juelich v. Yamazaki Mazak Optonics Corp.*, 682 N.W.2d 565, 571-72 (Minn. 2004); *Cox v. Hozelock, Ltd.*, 411 S.E.2d 640, 644 (N.C. App. 1992); *Hill v. Showa*

It is not even the case that the federal circuits apply the same test as their constituent states. *Cf.* Kaplan, 55 BAYLOR L. REV. at 544 (federal courts are not bound by state courts' "analysis of federal constitutional law"). For example, Georgia and West Virginia use the "stream of commerce" test, *Continental Research,* 419 S.E.2d at 52-53; *Hill*, 425 S.E.2d at 610, while the Eleventh and Fourth Circuits use "the stream of commerce plus" test. *Madara*, 916 F.2d at 1519; *Lesnick*, 35 F.3d at 945-46. Conversely, Mississippi uses the "stream of commerce plus" test, *Sorrells*, 636 So.2d at 674, while the Fifth Circuit uses the "stream of commerce" test. App. at 7. These anomalies have an enormous impact in the myriad cases where a product has been placed in the stream of commerce and diversity exists. Whether, for example, ***any*** court has personal jurisdiction in Georgia, Mississippi, and West Virginia in a diversity case would depend exclusively on the amount in controversy. In Mississippi, if the amount in controversy was under $75,000, no state court would have jurisdiction because Mississippi uses the "stream of commerce plus" test. Even though no state court would have personal jurisdiction, federal district courts would have jurisdiction if the amount in controversy was over $75,000 because the Fifth Circuit uses the "stream of commerce" test. The converse would be true in West Virginia and Georgia: a state court would have personal jurisdiction if the amount in controversy was under $75,000 because both states use the "stream of commerce" test, while if the amount in controversy was over $75,000, a federal district court would lack jurisdiction to hear the state law claim because both the Fourth and Eleventh Circuits use the "stream of commerce plus" test.

Denko, K.K., 425 S.E.2d 609, 610 (W. Va. 1992); *Kopke v. A. Hartrodt S.R.L.*, 629 N.W.2d 662, 672 (Wis. 2001).

It is fair to say, as the concurring Judge did here, that the minimum contacts test is now in a state of complete disarray. The Court should grant certiorari to define the contours of the due process requirements in this context.

2. The "Stream of Commerce Plus" Test Is Constitutionally Necessary

Defendants who sell their products to third parties and who have no contacts with the state forum (like petitioner) cannot be shown to have purposefully availed themselves of the benefits of doing business in that state. Simply put, the choice to do business in that state is not theirs. Yet the Court's interpretations of the Due Process Clause require that they be the ones who make that choice, for obvious reasons of anticipation and notice. "[T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagon*, 444 U.S. at 297.

As one commentator explained, "Minimum contacts jurisdiction is based on a reciprocal relationship of mutual obligations and benefits as between the defendant and the forum." Kaplan, 55 BAYLOR L. REV. at 579. Thus, the "minimum contacts theory gives the defendant a choice: It can engage in conduct that gives rise to the quid pro quo or it can avoid the quid pro quo by refraining from such conduct." *Id.* Consequently, the "stream of commerce plus" test is constitutionally necessary because only this test allows defendants to choose whether to engage in conduct that would give the state jurisdiction over the defendant.

In addition, requiring a defendant to have minimum contacts for a state to have jurisdiction performs two related functions recognized by the Court. "It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen, 444* U.S. at 291-292. Only the "stream of commerce plus" test adequately performs both of these functions.

Conversely, the "stream of commerce" test performs neither of these functions. The "stream of commerce" test arose from dicta in *World-Wide Volkswagen.*[8] *See, e.g, Nelson v. Park Indus., Inc.*, 717 F.2d 1120, 1124-25 (7th Cir. 1983); Howard B. Stravitz, *Sayonara to Minimum Contacts: Asahi Metal Industry Co. v. Superior Court*, 39 S.C. L. Rev. 729, 761, 786, 788 (1988). The principal argument for the "stream of commerce" test is that a defendant who sells products and expects they will eventually reach the forum state receives an economic benefit from the sale. *Asahi*, 480 U.S. at 107. Consequently, the defendant should not be surprised if it is sued in the forum state. *Id.* But this test proves too much in the modern business world. Given the speed with which products move and the advent of world-wide Internet sales, manufacturers must anticipate that their products could be sold in any and every forum, no matter how far-flung. Accordingly, the "stream of commerce" test requires any manufacturer to submit to jurisdiction in any forum anywhere.

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[8] Although *World-Wide Volkswagen* involved an isolated occurrence relating to a dealer, the Court discussed the stream of commerce test in the context of activities by "a manufacturer or distributor such as Audi or Volkswagen." *World-Wide Volkswagen*, 444 U.S. at 297.

In this regard, the "stream of commerce" test allows states to act outside their "boundaries of state sovereignty." As the Fourth Circuit explained, "[t]o permit a state to assert jurisdiction over any person in the country whose product is sold in the state simply because a person must expect that to happen destroys the notion of individual sovereignties inherent in our system of federalism." *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 945 (4th Cir. 1994). Moreover, the "act of injecting a product into the economy is not, automatically and simultaneously, an act directed toward each and every state." Spalding, 4 Nev. L.J. at 162. Thus, a rule that creates jurisdiction merely based on the "act of injecting a product into the economy," *id.*, "obliterate[s] the distinction between what is national and what is local." *United States v. Lopez*, 514 U.S. 549, 557 (1995) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

The "stream of commerce" foreseeability test also fails miserably in the Internet era. For example, consider a company that advertises on its website but only sells through brick and mortar locations within State A. Although the company does not sell in State B, residents of that state may access the company's web site. Some of those residents cross state lines to buy products from the company in State A. Under a "stream of commerce" test, it is unclear whether State B would have jurisdiction. Courts would consider such issues as the dollar value of the product taken to State B, the volume of product taken to State B, and the knowledge of the company regarding where its purchasers are. Whether personal jurisdiction existed in a "stream of commerce" circuit would depend on the fact-specific answers to these questions (along with the idiosyncrasies of the judge applying the "stream of commerce" test). The "stream of commerce plus" test, by contrast, would establish a brighter line based on activities purposefully directed at the other

states, such as having a sales agent in State B, advertising directed toward State B or sending personnel to repair products in State B.[9]

Thus, the "stream of commerce plus" test fully complies with the principles of federalism. By requiring the actual defendant to take an action directed toward the forum state, it upholds the unique jurisdiction of each state. Spalding, 4 Nev. L.J. at 162. In addition, the "stream of commerce plus" test "protects the right of a defendant to voluntarily consent to, or withdraw its consent from any given state." *Id.* It does not rely on "open-ended and discretionary jurisdictional standards." Condlin, 54 CATH. U. L. REV. at 499. Instead, it points to objective measurements to decide whether the defendant purposefully availed itself of the forum state: "for example, designing the product for the market in the forum state, advertising in the forum state, establishing channels for providing regular advice to customers in the forum state, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State." *Asahi* 480 U.S. at 112.

A "stream of commerce plus" test that looks to purposeful direction creates, if not a bright-line rule, then a more certain line between conduct that constitutes purposeful availment and conduct that does not. Justice O'Connor's examples illustrate activities that are easy to identify and leave a paper (or electronic) trail that provides telling

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[9] The Court explained in *Burnham v. Superior Court of California*, 495 U.S. 604 (1990), that sometimes the "evils" of a "totality of the circumstances" test, namely "uncertainty and litigation over the preliminary issue of the forum's competence," must be tolerated in terms of jurisdiction based on physical presence in the forum state. *Id.* at 626-627 (citing *Asahi*, 480 U.S. at 115). But there is no reason to accept those "evils" here, where "stream of commerce plus" provides a much brighter line in deciding whether jurisdiction exists.

evidence of the relevant facts. Thus, the "stream of commerce plus" test identifies those who have purposely availed themselves of a state and is constitutionally required.

3. The Question Presented Is Critical to Predictability in the Conduct of Modern Business

"The Due Process Clause, by ensuring the 'orderly administration of the laws, gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *World-Wide Volkswagen*, 444 U.S. at 297 (citation omitted). Thus, the minimum contacts test should provide certainty to those placing products in the stream of commerce. They should be able to plan for the potential of defending a suit in another state, or they should be able to avoid the necessary contacts with another state. Companies cannot plan if the applicable personal jurisdiction standards differ across the country.

The Fifth Circuit claimed that to avoid personal jurisdiction under the "mere foreseeability" of the "stream of commerce" test, Insta-Mix could have limited Wal-Mart's distribution to particular states. App. at 10, n.13. The Fifth Circuit was wrong. In the current legal environment, with so many conflicts among federal and state courts, it is virtually impossible for Insta-Mix to know where it can be sued. Consequently, the only way Insta-Mix could guarantee that it would not be sued in any given jurisdiction would be to go out of business. For example, as discussed *supra*, Mississippi uses the "stream of commerce plus" test. *Sorrells*, 636 So.2d at 674. But the Fifth Circuit uses the "stream of commerce" test. *Ruston Gas Turbines*, 9 F.3d at 420. Thus, if Insta-Mix had been sued on a state law claim

one state over, in Mississippi, there would ***not*** have been personal jurisdiction in a Mississippi state court if the amount in controversy was under $75,000, but there ***would*** have been jurisdiction in a Mississippi federal court if the amount in controversy was over $75,000. Thus, neither Insta-Mix nor any other business can do any more than guess where it could be sued under the current hodge-podge of "stream of commerce" versus "stream of commerce plus" jurisdictions.

Finally, even plaintiffs will benefit from a single national standard. "If a court lacks personal jurisdiction, it ... means that a subsequent federal court or the court of another state is not required to enforce [its] judgment." Moore's Federal Practice and Procedure §6.01[7]. Thus, without a uniform national standard, a plaintiff may not be able to have a judgment enforced if the judgment was entered by a state that uses the "stream of commerce" test but the enforcing state uses the "stream of commerce plus" test. *Cf. Griffis v. Luban,* 646 N.W.2d 527, 536-37 (Minn. 2002) (refusing to enforce a default judgment in Alabama lawsuit because Minnesota court found that Alabama court lacked jurisdiction due to what the Minnesota court believed was an incorrect interpretation of *Calder v. Jones,* 465 U.S. 783 (1984)). The nation needs one standard for personal jurisdiction.

4. This Case Is Particularly Well-Suited to Resolution of the Question Presented

The Fifth Circuit made it clear that under a "stream of commerce" test, a court would have jurisdiction over Insta-Mix. But as Judge DeMoss explained, there could not be jurisdiction under a "stream of commerce plus" test:

> Insta-Mix did no business in Louisiana; it had no agent for service of process in Louisiana; it negotiated a contract with Wal-Mart in Arkansas and it sold and delivered its products to Wal-Mart for its plant in Colorado; and Wal-Mart picked up Insta-Mix's products in Colorado on a Wal-Mart truck (or a truck contracted for by Wal-Mart). None of the plus factors defined by Justice O'Connor in *Asahi* are satisfied on the record here: Insta-Mix's product was not designed or designated for the Louisiana market; Insta-Mix did not advertise in Louisiana; Insta-Mix established no channels for providing regular advice to customers in Louisiana; and Insta-Mix did not market its product through a distributor who agreed to serve as a sales agent in Louisiana. *Asahi*, 480 U.S. at 112. ***In a stream-of-commerce-plus circuit, personal jurisdiction would not attach in this case...***

App. 17 (emphasis added).

Thus, this case is the appropriate vehicle for the Court to establish whether Justice Brennan's "stream of commerce" test or Justice O'Connor's "stream of commerce plus" test is the proper test to decide whether courts have personal jurisdiction over defendants who place products into the stream of commerce.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 22, 2006

In The United States Court of Appeals,
Fifth Circuit

No. 04-31171

LUV N' CARE, LTD.,

Plaintiff-Appellant,

VERSUS

INSTA-MIX, INC.; Umix, Inc.; Umixproducts, Inc.;Umix Sports, Inc.;Umixpro; and Umixbaby,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Louisiana

Filed: January 25, 2006

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Luv n' care, Ltd. ("Luv n' care"), a Louisiana corporation, appeals the dismissal of its suit against Insta-Mix, Inc., and several related entities (collectively "Insta-Mix"), citizens of Colorado, for lack of personal jurisdiction. We reverse and remand.

I.

Luv n' care is an international corporation based in Monroe, Louisiana, that specializes in the design, manufacture, and sale of a variety of infant care products. Insta-Mix is a small Colorado corporation that holds the patent on a two-chambered plastic bottle with a freezable core, for use by both athletes and children. The design of the straw cap of Insta-Mix's bottle allegedly bears resemblance to a bottle cap produced by Luv n' care.[1]

Insta-Mix has sold 82,224 of its patented bottles to Wal-Mart and a few other vendors. Although Wal-Mart resells the product at its retail locations, Insta-Mix does not ship the product directly to Wal-Mart stores but, instead, trucks or third-party carriers assigned by Wal-Mart transport the bottles from Insta-Mix's dock in Colorado Springs to one of twenty-six distribution centers nationwide.

The vendor agreement that gives Wal-Mart the right to purchase and retail these bottles indicates that Wal-Mart assumes ownership of the bottles when they are loaded in Colorado Springs. The agreement also mentions several possible distribution centers, but none in Louisiana. Wal-Mart transported 3,696 copies of the bottle, or approximately 65 shipments, with total revenue to Insta-Mix of $8,923.20, to its distribution center in Opelousas, Louisiana.

Insta-Mix received and filled purchase orders from Wal-Mart via an "Electronic Data Interchange" ("EDI") system, which contains information regarding the price, quantity, and destination of each shipment. Once an order is filled, the EDI

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[1] Apparently the manufacturer, Royal King, claims proprietary rights to the molds from which the allegedly infringing bottle cap is produced.

system automatically sends to Wal-Mart an electronic invoice that contains the letterhead of an Insta-Mix-related entity and the destination address.

The record contains several invoices with a "send to" location of the Wal-Mart distribution center in Opelousas. Insta-Mix alleges that it had no knowledge of the destination of the products until it printed out information from the EDI system in response to a discovery request in this litigation. It appears that eventually some of Insta-Mix's bottles reached Wal-Mart stores in Louisiana, repackaged under the Wal-Mart trade name.

It is undisputed that Insta-Mix has no employees or agent for service of process in Louisiana and conducts no direct sales or marketing there. Rather, its only contact with Louisiana is its sales of items to Wal-Mart.

II.

Luv n' care sued Insta-Mix for copyright infringement, 17 U.S.C. § 101 *et seq.*, and trademark dilution and unfair competition under the Lanham Act, 15 U.S.C. §§ 1125(a)(1)(A) and (B). Insta-Mix moved to dismiss under Federal Rule of Civil Procedure 12(b)(2) and (3) for lack of personal jurisdiction and improper venue.

The magistrate judge issued a recommendation that the suit be dismissed because "[s]imply placing [a] product in the stream of commerce is not sufficient to create personal jurisdiction even if it were foreseeable that the product might end up in Louisiana." Because the magistrate judge found the jurisdictional issue dispositive, he did not reach the venue issue. The district court adopted the recommendation.

III.

We review *de novo* a district court's determination that it lacks personal jurisdiction over a non-resident defendant. *Adams v. Unione Mediterranea Di Sicurta*, 220 F.3d 659, 667 (5th Cir.2000). Where a defendant challenges personal jurisdiction, the party seeking to invoke the power of the court bears the burden of proving that jurisdiction exists. *Wyatt v. Kaplan*, 686 F.2d 276, 280 (5th Cir.1982). The plaintiff need not, however, establish jurisdiction by a preponderance of the evidence; a *prima facie* showing suffices. *Id.* This court must resolve all undisputed facts submitted by the plaintiff, as well as all facts contested in the affidavits, in favor of jurisdiction. *Id.*

The Due Process Clause of the Fourteenth Amendment guarantees that no federal court may assume jurisdiction *in personam* of a non-resident defendant unless the defendant has meaningful "contacts, ties, or relations" with the forum state. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319, 66 S.Ct. 154, 90 L.Ed. 95 (1945). Jurisdiction may be general or specific. Where a defendant has "continuous and systematic general business contacts" with the forum state, *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984), the court may exercise "general" jurisdiction over any action brought against that defendant. *Id.* at 414, 104 S.Ct. 1868 n. 9. [2] Where contacts are less pervasive, the court may still exercise "specific" jurisdiction "in a suit arising out of or related to the defendant's contacts with the forum." *Id.* at

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[2] Federal courts may also always assume jurisdiction over a defendant in any action in which there is personal, in-state service of process. *Burnham v. Superior Court*, 495 U.S. 604, 110 S.Ct. 2105, 109 L.Ed.2d 631 (1990).

414, 104 S.Ct. 1868 n. 8. This case presents only the question of specific jurisdiction.

A federal court may satisfy the constitutional requirements for specific jurisdiction by a showing that the defendant has "minimum contacts" with the forum state such that imposing a judgment would not "offend traditional notions of fair play and substantial justice." *Int'l Shoe*, 326 U.S. at 316, 66 S.Ct. 154. In *Nuovo Pignone v. Storman Asia M/V*, 310 F.3d 374 (5th Cir.2002), we consolidated the personal jurisdiction inquiry into a convenient three-step analysis: "(1) whether the defendant ... purposely directed its activities toward the forum state or purposely availed itself of the privileges of conducting activities there; (2) whether the plaintiff's cause of action arises out of or results from the defendant's forum-related contacts; and (3) whether the exercise of personal jurisdiction is fair and reasonable." *Id.* at 378 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985)). The forum state may create, and this court would be bound to apply, additional jurisdictional restrictions by statute, *Adams*, 220 F.3d at 667, but Louisiana's "long-arm" statute extends jurisdiction to the constitutional limit, La. R.S. 13:3201(B), so the two inquiries in this case fold into one.

A.

To determine whether Insta-Mix has "minimum contacts" with Louisiana, we must identify some act whereby it "purposely avail[ed] itself of the privilege of conducting activities [there], thus invoking the benefits and protections of its laws." [3] The defendant's conduct must show that it

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[3] *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958). A single purposeful contact may confer jurisdiction. *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 222, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957).

"reasonably anticipates being haled into court" in Louisiana. World Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980). Likewise, a defendant may permissibly alter its behavior in certain ways to avoid being subject to suit. *Id.*

The district court erred in holding that placing a product into the stream of commerce, at least where the defendant knows the product will ultimately reach the forum state, does not rise to the level of "purposeful availment." This court has consistently held that "mere foreseeability or awareness [is] a constitutionally sufficient basis for personal jurisdiction if the defendant's product made its way into the forum state while still in the stream of commerce." [4] We adopted this position in an effort faithfully to interpret *World Wide Volkswagen*, 444 U.S. at 298, 100 S.Ct. 559, which holds that a state does not offend due process by exercising jurisdiction over an entity that "delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State."

Where a defendant knowingly benefits from the availability of a particular state's market for its products, it is only fitting that the defendant be amenable to suit in that state.[5] We have, therefore, declined to follow the suggestion

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[4] *Ruston Gas Turbines v. Donaldson Co.*, 9 F.3d 415, 419 (5th Cir.1993) (citing *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 111, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987)); *Bean Dredging Corp. v. Dredge Tech. Corp.*, 744 F.2d 1081 (5th Cir.1984).

[5] See *Oswalt v. Scripto, Inc.*, 616 F.2d 191, 199-200 (5th Cir.1980) (finding jurisdiction where defendant had "attempted in [no] way to limit the states in which the [products] could be sold" but instead "had every reason to believe its product would be sold to a nation-wide market, that is, in any or all states").

of the plurality in Asahi, 480 U.S. at 112, 107 S.Ct. 1026, that some additional action on the part of the defendant, beyond foreseeability, is necessary to "convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State."[6] Applying this circuit's more relaxed "mere foreseeability" test to the facts of this case, we conclude that Insta-Mix's contacts with Louisiana are sufficient to withstand constitutional scrutiny.

Insta-Mix maintains that Wal-Mart had complete control over the ultimate destination of its goods once they left the warehouse in Colorado Springs and that Wal-Mart could even make a mid-stream decision to re-route the goods to other distribution centers not listed on the invoices. A "unilateral decision to take a chattel ... to a distant State" does not suffice to confer jurisdiction. World Wide Volkswagen, 444 U.S. at 314, 100 S.Ct. 559.[7] This case, though, does not present facts to the effect that a buyer transported goods intended for Louisiana to a distribution center in a far-away state. Rather, in 2002 and 2003 Insta-Mix filled approximately sixty-five purchase orders for items bound for Louisiana and sent invoices to Wal-Mart confirming the same.

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[6] The *Asahi* plurality listed the following as possible additional actions that would evidence an intent to serve the market of the forum state: "designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State." *Id.*

[7] *See also Burger King*, 471 U.S. at 475, 105 S.Ct. 2174 (reasoning that defendant may not be haled into court on account of "random, fortuitous, or attenuated" contacts) (internal quotations omitted).

Insta-Mix claims that its employees had no actual knowledge of the intended destination of its goods until it consulted the EDI system in preparation for this litigation. This claim is implausible and could not defeat jurisdiction even if true. It is eminently foreseeable that Insta-Mix's products would reach the market indicated on the company's invoices. In fact, Insta-Mix derived substantial revenue (about 4.5% of its total distribution) from its sale of thousands of units bound for Opelousas.[8] Although businesses should be able to take advantage of the increased efficiencies made possible by the electronic processing of purchase orders, they cannot then claim ignorance of the contents of those orders once their products inevitably reach the intended market.[9]

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[8] *See Bean Dredging*, 744 F.2d at 1085 (deciding that introducing merely thousands, not millions, of items into the stream of commerce "is not enough to convince us that [defendant] had no interest in reaching as broad a market as it possibly could.... [T]he defendant here evidenced no attempt to limit the states in which its [products] would be sold and used."); *cf. World Wide Volkswagen*, 444 U.S. at 299, 100 S.Ct. 559 (holding that the "marginal revenues" derived from the fact that a product is merely "capable of use" in a distant state is "too attenuated a contact" to support jurisdiction).

[9] *See Asahi*, 480 U.S. at 121, 107 S.Ct. 1026 (Brennan, J., concurring) (finding for a four-Justice plurality that although defendant "did not design or control the system of distribution that carried its [products] into [the forum state, defendant] was aware of the distribution system's operation, and it knew it would benefit economically from the sale in [the forum state] of products incorporating its components.") (internal quotations omitted). We further agree with Luv n' care that a contrary holding would permit foreign defendants to avoid jurisdiction in the United States by structuring their data systems to shield employees from the knowledge that their products ultimately will reach the United States.

Finally, Insta-Mix argues that it has structured its primary conduct to avoid jurisdiction by including in the vendor agreement a condition that transfers ownership from Insta-Mix to Wal-Mart at the time that Wal-Mart receives its shipments in Colorado Springs. Jurisdiction, however, "does not depend on the technicalities of when title passes;" rather, jurisdiction may attach both to manufacturers who supply their own delivery systems and to those that make use of the distribution systems of third parties. Oswalt, 616 F.2d at 197 n.8.[10]

In the interest of promoting that "degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit," World Wide Volkswagen, 444 U.S. at 297, 100 S.Ct. 559, we conclude that a F.O.B. term does not prevent a court from exercising personal jurisdiction over a non-resident defendant where other factors, such as the quantity and regularity of shipments, suggest that jurisdiction is proper.[11] This reasoning is supported by authority that

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[10] We have suggested, however, that the existence of a Free On Board ("F.O.B.") term in a contract is one factor to consider in determining whether the defendant has "minimum contacts" with the forum state. *See Singletary v. B.R.X., Inc.*, 828 F.2d 1135, 1136 (5th Cir.1987) (finding that the "contact was weakened even further by the fact that the sale was initiated by the buyer and was shipped F.O.B. California, the seller's place of business."); *Charia v. Cigarette Racing Team, Inc.*, 583 F.2d 184, 188-89 (5th Cir.1978) (concluding that F.O.B. shipment, without more, does not constitute purposeful availment of the laws of the forum state).

[11] For example, in *Charia*, 583 F.2d at 189, the court found that "four sporadic and isolated sales" did not establish a sufficient basis for assertion of jurisdiction but noted that a case in which defendant "had supplied its product to the forum state in large quantities over a lengthy period of time" might be treated differently. Likewise, in *Singletary* the

states that the primary purpose of a F.O.B. term is to allocate the risk of damage to goods between buyer and seller.[12] Accordingly, Insta-Mix purposely availed itself of the benefit of the Louisiana market for its bottle, thereby establishing "minimum contacts" with the forum state.[13]

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defendant had sold only one $33 part to a resident of the forum state. *See Singletary*, 828 F.2d at 1136.

[12] Nuovo Pignone, 310 F.3d at 380 n. 5 (stating that "incoterms are used ... to allocate risk between buyers and sellers"); see also William V. Roth, Jr. & William V. Roth III, Incoterms: Facilitating Trade in the Asian Pacific, 18 U. PA. J. INT'L ECON. L. 731, 734 (1997) (describing the division of risk between buyer and seller in a standard incoterm and noting that "[m]ost importantly, the risk of damage to the goods shifts from seller to buyer exactly at the point where the goods" are surrendered to the carrier) (internal citations omitted).

[13] We disagree with Insta-Mix that this conclusion means that it must choose between doing business with Wal-Mart or being subject to suit in all fifty states. It is possible that Insta-Mix will avoid suit in a jurisdiction that requires some additional act beyond "mere foreseeability" for personal jurisdiction to attach. *See, e.g., Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 683 (1st Cir.1992). Moreover, we do not speak to a situation in which, for example, jurisdiction is asserted in a state to which the allegedly offending Insta-Mix product has not been regularly shipped in substantial quantities directly from Insta-Mix facilities.

Insta-Mix could also attach conditions to its vendor agreement that forbid Wal-Mart from shipping to those states that operate under a "mere foreseeability" regime, or to all distribution centers outside the Great Plains, or to any forum in which mounting a defense would be inconvenient. The fact that it has not done so supports our conclusion that Insta-Mix intends to avail itself of as wide a market for its goods as possible. *See Bean Dredging*, 744 F.2d at 1085. Until presented with such a case, we reserve judgment on the ultimate effectiveness of any contractual condition designed to avoid jurisdiction.

In those cases, the court found that the F.O.B. condition in the contract reinforced the holding that jurisdiction in the forum state was unforeseeable. Here, however, jurisdiction is foreseeable because of the regularity and quantity of shipments and the presence of a destination address on defendant's invoices. Where jurisdiction is otherwise foreseeable, a F.O.B. term cannot deprive the court of jurisdiction over the defendant.

B.

It is not enough to satisfy due process that Insta-Mix has some "minimum contacts" with Louisiana. Rather, the underlying cause of action must "arise out of" the defendant's contacts with the forum state.[14] Luv n' care alleges that the presence of Insta-Mix's products in Louisiana infringed on Luv n' care's copyright.

"[T]his court has been reluctant to extend the stream-of-commerce principle outside the context of products liability cases," including cases involving "contract or copyright." *Nuovo Pignone*, 310 F.3d at 381. This is because contracting parties have more flexibility to tailor their relationship in view of jurisdictional considerations than do the manufacturer and consumer in a typical products liability case. *Id.* Nevertheless, we have found jurisdiction where "the same public policy concerns that justify use of the stream-of-commerce principle in the products liability context are present." *Id.*

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[14] See *Shaffer v. Heitner*, 433 U.S. 186, 204, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977) (opining that "the relationship among the defendant, the forum, and the litigation ... [is] the central concern of the inquiry into personal jurisdiction"); *Nuovo Pignone*, 310 F.3d at 378.

In *Nuovo Pignone*, the defendant Fagioli, an Italian shipper, allegedly damaged plaintiff's cargo with a defective onboard shipping crane while docking and unloading at a Louisiana port. We found jurisdiction even though Fagioli, like Insta-Mix, employed third-party intermediaries at the point of injury, i.e., the unloading dock. We further opined that Fagioli should have considered the possible damage that a defective crane aboard its vessel would cause in the forum state. Similarly, Insta-Mix should have known, when it availed itself of the Louisiana market for infant care products, that it could face potential liability from competitors with similarly-designed items.[15]

The closest analogue to the present case is *Ham v. La Cienega Music Co.*, 4 F.3d 413 (5th Cir.1993), in which we denied jurisdiction because there was a "highly attenuated" relationship between defendant's contact with the forum state and plaintiff's declaratory judgment action for copyright infringement. *Ham*, 4 F.3d at 416. In *Ham*, however, the allegedly infringing song was different from the one that had been distributed through the stream of commerce to the forum state. The court suggested the result might be different if the song distributed in Texas and the allegedly infringing song were one and the same. *Id.* at 416 n.13.

Luv n' care claims infringement from the same bottle that traveled through the stream of commerce from Colorado to Louisiana. This connection between the allegedly infringing

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[15] See also *Gulf Consol. Servs., Inc. v. Corinth Pipeworks, S.A.*, 898 F.2d 1071, 1073-74 (5th Cir.1990) (finding jurisdiction in a breach of warranty action).

product and the forum state is sufficient to confer personal jurisdiction.[16]

C.

It remains for us to inquire whether the exercise of jurisdiction would "offend traditional notions of fair play and substantial justice." *International Shoe*, 326 U.S. at 316, 66 S.Ct. 154. When a plaintiff makes its *prima facie* case that the defendant has "minimum contacts" with the forum state, the burden of proof shifts to the defendant to show that the exercise of jurisdiction would be unreasonable. *Nuovo Pignone*, 310 F.3d at 382. In conducting the fairness inquiry, we examine (1) the burden on the nonresident defendant, (2) the forum state's interests, (3) the plaintiff's interest in securing relief, (4) the interest of the interstate judicial system in the efficient administration of justice, and (5) the shared interest of the several states in furthering fundamental social policies. Felch v. Transportes Lar-Mex SA De CV, 92 F.3d 320, 324 (5th Cir.1996).

Insta-Mix relies primarily on the third and fourth elements, arguing that Luv n' care has not named Wal-Mart, the retailer, nor Royal King, the alleged manufacturer of the bottle top, as the more natural defendants. Nor can the district court grant full injunctive relief where Wal-Mart remains free to sell, and Royal King remains free to produce,

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[16] This reasoning applies with equal force to Luv n' care's claims of trademark dilution and unfair competition under the Lanham Act, which in fact instructs the court, when deciding whether to issue an injunction to protect the trademark owner, to consider, inter alia, "the degree of recognition of the mark in the trading areas and channels of trade used by the mark's owner and the person against whom the injunction is sought." 15 U.S.C. § 1125(c)(1)(F). We reserve judgment on whether jurisdiction would lie for other causes of action outside the arena of products liability.

the infringing cap. Therefore, Insta-Mix portrays this action as an effort by Luv n' care, a major manufacturer, to intimidate a small competitor into exiting the market.

If Luv n' care's suit is indeed frivolous, the district court presumably will deal with that deficiency. But, where a product allegedly causes economic injury in Louisiana, it is in the interest of that state to have its courts mediate the dispute. Furthermore, it is not unreasonable to ask Insta-Mix to defend in Louisiana, where the company avails itself of the benefit of that state's market for thousands of iterations of its product. The forum state (Louisiana) and the plaintiff (Luv n' care, which is organized under Louisiana law and based there) obviously have some legitimate interest in litigating this matter in Louisiana, where there has been regular distribution of a number of the allegedly offending products.[17] Therefore, traditional notions of fair play and substantial justice do not require that this suit be dismissed for want of personal jurisdiction.[18]

The judgment of dismissal is REVERSED, and this matter is REMANDED for further proceedings.[19]

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[17] *See Bean Dredging*, 744 F.2d at 1085 (reasoning that "[b]ecause the product was used in Louisiana, because the defects surfaced in Louisiana, because the economic injury has befallen a resident of Louisiana ... that state has an interest in providing a forum for this suit").

[18] We also note that although Wal-Mart may be a more natural defendant in this action, the vendor agreement between Wal-Mart and Insta-Mix states that Insta-Mix shall defend and indemnify Wal-Mart against, *inter alia*, any actual or alleged copyright infringement.

[19] Because the district court did not rule on Insta-Mix's alternative argument on improper venue, we do not reach that issue, and the parties are free to raise it on remand.

DeMOSS, Circuit Judge, specially concurring:

I concur in the majority opinion because I recognize that Fifth Circuit precedent binds us to follow the "stream of commerce" approach in personal jurisdiction cases;[20] however, I write separately for two reasons: (1) to note that if it were not for that precedent, I would certainly vote to decide this case under the "stream-of-commerce-plus" approach announced by Justice O'Connor in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987), and (2) to highlight how this case contributes to the circuit split created by *Asahi*, a split I urge the Supreme Court to resolve.

In my opinion, Justice O'Connor's stream-of-commerce-plus theory is the more constitutionally defensible of the two theories of minimum contacts to emerge from *Asahi*. The principle of "minimum contacts" is a court-created principle that effectively limits a state's exercise of jurisdiction over nonresident defendants. Jurists have long recognized "that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that

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[20] *See Ruston Gas Turbines, Inc. v. Donaldson Co.*, 9 F.3d 415, 420 (5th Cir.1993). Writing for the unanimous panel in *Ruston*, I described the Fifth Circuit's long-time support of the "stream of commerce" theory and rejection of the "stream-of-commerce-plus" theory. *Id.* In that case, application of the "stream of commerce" theory to the facts at hand led to a reasonable result, in part because *Ruston* involved more than mere placement of a product into the stream of commerce. *See id.* at 417-18 (third-party defendant shipped products directly to forum, sent employees to forum to consult with customers). The exercise of personal jurisdiction over Insta-Mix in this case, however, stretches the stream of commerce theory to its outer limits, and thereby reveals the flaws in the stream of commerce approach.

territory so as to subject either persons or property to its decisions." *Pennoyer v. Neff*, 95 U.S. [5 Otto] 714, 722, 24 L.Ed. 565 (1877). Thus, the "minimum contacts" test was developed over time to define the necessary contact a nonresident defendant must have with a state before the defendant can be subjected to suit there. *Asahi* is the last in a long line of Supreme Court cases to define the contours of that test, and it left the test in a state of complete disarray. Only three Justices joined the portion of Justice O'Connor's plurality opinion that embraced the stream-of-commerce-plus approach to minimum contacts; of the five remaining Justices, three Justices joined Justice Brennan in a concurrence that embraced the stream of commerce approach and Justice Stevens wrote his own concurrence embracing neither. It is the stream of commerce approach that the Fifth Circuit follows and that I criticize here (although I recognize its binding effect). The stream of commerce, or "mere foreseeability," approach requires only that a nonresident defendant place its product in the stream of commerce with the expectation that the product will reach the forum state. *Nuovo Pignone, SpA v. STORMAN ASIA M/V*, 310 F.3d 374, 380 & n. 7 (5th Cir.2002). As Judge Niemeyer of the Fourth Circuit eloquently stated in *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 945 (4th Cir.1994), "To permit a state to assert jurisdiction over any person in the country whose product is sold in the state simply because a person must expect that to happen destroys the notion of individual sovereignties inherent in our system of federalism." Justice O'Connor's stream-of-commerce-plus approach states that mere foreseeability is not enough and requires "[a]dditional conduct of the defendant ... indicat[ing] an intent or purpose to serve the market in the forum State," and thereby better comports with our country's principles of federalism. *See Asahi*, 480 U.S. at 112, 107 S.Ct. 1026.

This case is the proverbial straw that breaks the camel's back because it stretches the stream of commerce theory beyond its past limits and thus deepens the divide between circuits that require "additional conduct" and those that do not. Subjecting Insta-Mix to suit in Louisiana creates a "Wal-Mart exception," rendering any small company that sells a product to Wal-Mart subject to suit in any state in the nation in which Wal-Mart resells the company's products. Insta-Mix did no business in Louisiana; it had no agent for service of process in Louisiana; it negotiated a contract with Wal-Mart in Arkansas and it sold and delivered its products to Wal-Mart for its plant in Colorado; and Wal-Mart picked up Insta-Mix's products in Colorado on a Wal-Mart truck (or a truck contracted for by Wal-Mart). None of the plus factors defined by Justice O'Connor in Asahi are satisfied on the record here: Insta-Mix's product was not designed or designated for the Louisiana market; Insta-Mix did not advertise in Louisiana; Insta-Mix established no channels for providing regular advice to customers in Louisiana; and Insta-Mix did not market its product through a distributor who agreed to serve as a sales agent in Louisiana. *Asahi*, 480 U.S. at 112, 107 S.Ct. 1026. In a stream-of-commerce-plus circuit, personal jurisdiction would not attach in this case. But under the mere foreseeability test that controls our circuit, Insta-Mix is subject to suit in Louisiana. This result on this record defies principles of federalism and therefore presses for the repudiation of the "stream of commerce" approach to personal jurisdiction.

For the above reasons, I hope Insta-Mix will apply for a writ of certiorari and I urge the Supreme Court to take up the minimum contacts issue and resolve it and the increasing circuit divide with clarity. The recent changes in the composition of the Court should produce a new effort by the

Court to definitively answer this controversy. The sovereignty of the individual states is on the line.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

LUV N' CARE, LTD.,	)
Plaintiff,	)
v.	)
INSTA-MIX, INC., UMIX, INC., UMIXPRODUCTS, INC., UMIX SPORTS, INC., UMIXPRO, and UMIXBABY	)
Defendants.	)

ORDER AND AMENDED JUDGMENT

Upon consideration of Plaintiff Luv n'care's Motion for Modification of Judgment under Fed. R. Civ. Pro. 50, 59 and 60;

It is hereby ordered that Plaintiff's motion is GRANTED.

The Judgment entered by the Court on October 12, 2004 in this matter, and any findings of fact and conclusions of law therein, are hereby amended and modified under Fed. R. Civ. Pro. 50, 59 and 60 to provide that Plaintiff's claims have been dismissed without prejudice.

Dated: October 28, 2004
Monroe, Louisiana

-Signed-
HON. ROBERT G. JAMES
U.S. DISTRICT COURT
JUDGE

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

LUV N CARE, LTD.	CIVIL ACTION NO. 03-1657-M
VERSUS	U.S. DISTRICT JUDGE ROBERT G. JAMES
INSTA-MIX, Inc., et al	U.S. MAGISTRATE JUDGE JAMES D. KIRK

REPORT AND RECOMMENDATION

Before the court is defendants' motion to dismiss, Doc. #8 referred to me by the district judge for report and recommendation. The motion seeks dismissal based on lack of personal jurisdiction over the defendants or, alternatively, for lack of proper venue. Limited discovery on these issues has been completed.

Background

Claimant, Luv N Care, Ltd. (Luv N Care) is a Louisiana corporation which manufactures baby drinking bottle products. It claims defendants, all related entities owned by Insta-mix, Inc. (Insta-mix), infringed on its non-patented bottle design, and seeks declaratory relief and damages. Defendant, Insta-Mix, is a Colorado corporation and claims this Louisiana court has no jurisdiction over it.

Discussion

Insta-Mix asserts that it sells its product only to distributors and does not sell retail anywhere in the United States. It sells primarily to Wal-Mart Stores, Inc. headquartered in Bentonville Arkansas. Insta-Mix asserts that it has made no direct sales of products to Louisiana and has done no direct marketing of its products in Louisiana and has no sales personnel in Louisiana. It has not "set foot in" Louisiana, it claims and has not conducted business activities in Louisiana. Claimant urges that, because defendants have sold to Wal-Mart, Louisiana courts have jurisdiction.

The burden to make a prima facie showing that the defendants have meaningful contacts with Louisiana rests with the plaintiffs. Revell v. Lidov, 317 Fed. 3d 467 (5th C. 2002); International Shoe Co. v. State of Washington, 66 S. Ct. 154 (1945); Wilson v. Belin, 20 Fed. 3d 644 (5th C. 1994), cert. den., 115 S. Ct. 322. The court must accept plaintiffs' uncontroverted allegations as true, but it may consider affidavits and other documentation resolving conflicts in favor of claimant. See Guidry v. U. S. Tobacco Co., Inc., 188 Fed. 3d 619 (5th C., 1999); Revell, supra.

Federal courts in Louisiana may exercise jurisdiction over a non-resident defendant only to the extent allowed by Louisiana's Long Arm statute and as consistent with due process. Stripling v. Jordan Production Co., LLC, 234 Fed. 3d 863 (5th C. 2000). Louisiana's long arm statute extends jurisdiction to the constitutional limits of due process. La. R.S. 13:3201(B). Burstein v. State Bar of California, 693 Fed.2d 511 (5th C. 1982). Jurisdiction consistent with due process exists where the defendant has purposely availed himself of the benefits and protections of the forum state by establishing "minimum contacts" with the forum state, and

the exercise of jurisdiction over that defendant does not offend "traditional notions of fair play and substantial justice." Mink v. AAAA Development LLC, 190 Fed. 3d 333, 336 (5th C. 1999) (quoting International Shoe., supra).

Minimum contacts may be established either through contacts sufficient to assert specific jurisdiction or contact to assert general jurisdiction. Alpine View Co. Ltd. v. Atlas Coco AB, 205 Fed. 3d 208, 214 (5th C. 2000). Only where a non-resident defendant has "purposely directed its activities at the forum state and the litigation results from alleged injuries that arise out of or relate to those activities" are the defendants' contacts sufficient to support the exercise of specific jurisdiction over that defendant. Burger King v. Rudzewicz, 105 S. Ct. 2174 (1985). Stated differently, specific jurisdiction exists where a defendant 'purposely avails itself of the privileges of conducting activities within the forum state, thus invoking the benefits of its laws." Dickson Marine, Inc. v. Panalpina, Inc., 179 Fed. 3d 331 (5th C. 1999).

The minimum contacts required to pass constitutional muster may be those unrelated to the claimant's cause of action (general jurisdiction), or may be related to claimant's cause of action (specific jurisdiction).

Louisiana's long arm statute provides:

"§3201. Personal jurisdiction over nonresidents

A. A court may exercise personal jurisdiction over a nonresident, who acts directly or by an agent, as to a cause of action arising from any one of the following activities performed by the nonresident:

(1) Transacting any business in this state.
(2) Contracting to supply services or things in this State.
(3) Causing injury or damage by an offense or quasi offense committed through an act or omission in this State.
(4) Causing injury or damage in this state by an offense or quasi offense committed through an act or omission outside of this state if he regularly does or solicits Business, or engages in any other persistent course of conduct, or derives revenue from goods used or consumed or services rendered in this state.
(5) Having an interest in, using or possessing a real right on immovable property in this state.
(6) Non-support...
(7) Parentage...
(8) Manufacturing of a product or component thereof which caused damage or injury in this state...

B. In addition to the provisions of Subsection A, a court of this state may exercise personal jurisdiction over a nonresident on any basis consistent with the constitution of this state and of the constitution of the United States."

In this case, plaintiffs have not shown by affidavit or otherwise any history of continuous and systematic contacts between the non-resident defendants and Louisiana. Plaintiffs point to no activities of defendants in Louisiana other than those they allege are related to the activities giving rise to this lawsuit. In addition, the evidence reflects that defendant companies do not now and have never done

business in Louisiana and do not employ people in the state. Defendants have no agent for service in the state.

In regard to specific jurisdiction, plaintiffs point only to the fact that defendants ship a small amount of products to one of Wal-Mart's distribution centers located near Opelousas Louisiana. Plaintiff claims that because defendants placed the product into the steam of commerce, this court has jurisdiction over Insta-Mix.

No evidence is contained in the record as to the geographic area Wal-Mart's distribution center serves, but the evidence does reflect that Wal-Mart has some 26 centers nationwide. It is safe to assume, and the affidavit of Nouri Hakim shows, that defendants' product is sold in some Louisiana Wal-Mart stores. However, the testimony by deposition of James Holley reflects that sales to Wal-Mart were negotiated by him in Bentonville Arkansas. The orders were entered electronically, and although the invoices show Wal-Mart's intended destination of the goods bought from Insta-Mix, those goods are sold in Colorado and picked up by Wal-Mart on its own truck or by a trucking company which Wal-Mart hires in Colorado. In other words, Insta-Mix does not ship to the distribution center in Louisiana, but rather places its goods on a Wal-Mart truck and Walmart takes the goods where it wants to. The fact that the invoice shows a particular destination, is apparently for Wal-Mart's use and benefit and does not change the fact that Insta-Mix sold and delivered the products in Colorado. Simply placing the product in the stream of commerce is not sufficient to create personal jurisdiction even if it were foreseeable that the product might end up in Louisiana. See World-Wide Volkswagen Corp. v. Woodson, 100 S. Ct. 559 (1980). Here Insta-Mix has not purposely availed itself of the benefits of Louisiana.

Claimant cites Bean Dredging Corporation v. Dredge Technology Corporation, 744 Fed 2d 1081 (5th C. 1984) for the proposition that where a manufacturer distributes its product broadly through a distributor, that manufacturer may be subject to a particular forum's jurisdiction. In this case, however, the record reveals that Insta-Mix sold a total $8,923.20 to Wal-Mart which Wal-Mart chose to ship to Louisiana. No direct sales in Louisiana were made to anyone. The facts presented here are easily distinguished from Bean Dredging.

Similarly, plaintiff points to Vault Corporation v. Quaid Software Limited, 775 Fed. 2d 638 (5th C. 1985). However, Vault too is easily distinguishable. There the defendant advertised in national magazines and it made direct sales to Louisiana customers. Here Insta-Mix had no expectation that the goods sold and delivered to Wal-Mart in Colorado would be purchased by consumers in Louisiana. Worldwide Volkswagen, supra. As Defendant aptly points out in brief, were the court to find that jurisdiction exists under these facts, then everyone who does business with Wal-Mart shall have automatically consented to jurisdiction in almost every state in the country. Such is simply not consistent with the Supreme Court's holding in Worldwide Volkswagen.

Because I find that Insta-Mix had insufficient contacts with Louisiana to justify exercise of personal jurisdiction over it, I need not reach the alternative argument regarding improper venue.

For the foregoing reasons, IT IS RECOMMENDED, that defendants' Motion to Dismiss be granted, and that claimant's claims be dismissed.

OBJECTIONS

Under the provisions of 28 U.S.C. § 636(b)(1)(C) and Fed.R.Civ.P. 72(b), the parties have ten (10) business days from service of this Report and Recommendation to file specific, written objections with the clerk of court. A party may respond to another party's objections within ten (10) days after being served with a copy thereof. A courtesy copy of any objection or response or request for extension of time shall be furnished to the district judge at the time of filing. Timely objections will be considered by the district judge before he makes his final ruling.

FAILURE TO FILE WRITTEN OBJECTIONS TO THE PROPOSED FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS CONTAINED IN THIS REPORT WITHIN TEN (10) BUSINESS DAYS FROM THE DATE OF ITS SERVICE SHALL BAR AN AGGRIEVED PARTY, EXCEPT UPON GROUNDS OF PLAIN ERROR, FROM ATTACKING ON APPEAL THE UNOBJECTED-TO PROPOSED FACTUAL FINDINGS AND LEGAL CONCLUSIONS ACCEPTED BY THE DISTRICT JUDGE.

THUS DONE AND SIGNED in chambers, in Alexandria, Louisiana, on this the 24th day of August 2004.

/s/ James D. Kirk
JAMES D. KIRK
UNITED STATES
MAGISTRATE JUDGE

(3)

No. 05-1232

FILED
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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

INSTA-MIX, INC., UMIX, INC., UMIXPRODUCTS, INC., UMIX SPORTS, INC., UMIXPRO, and UMIXBABY,

Petitioners,

v.

LUV N' CARE, LTD.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Fifth Circuit's decision that due process permits jurisdiction over an entity that delivers products into the stream of commerce with the expectation they will be purchased by consumers in the forum State (an approach it has followed before and after *Asahi*, further to *World-Wide Volkswagen*), requires review by this Court after extensive contacts by Petitioner with the Louisiana forum.

STATEMENT PURSUANT TO RULE 29.6

Respondent, Luv n' care, Ltd., has no parent corporation and no publicly held company owns 10% or more of its stock.

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CONSTITUTIONAL QUESTION INVOLVED

Petitioners have asserted that the constitutional provision implicated is the Due Process Clause of the Fourteenth Amendment. In fact, subject matter jurisdiction exists here by virtue of a federal question, rather than diversity of the parties. Therefore, the provision at issue is, more accurately, the Due Process Clause of the Fifth Amendment. *See, e.g., Akro Corp. v. Luker*, 45 F.3d 1541, 1544-1545 (Fed. Cir. 1995); *Honeywell, Inc. v. Metz Apparatewerke*, 509 F.2d 1137, 1143 (7th Cir. 1975); *Dakota Industries, Inc. v. Dakota Sportswear, Inc.*, 946 F.2d 1384, 1389 n.2 (8th Cir. 1991).

STATEMENT OF THE CASE

Respondent Luv n' care is a corporation headquartered in Monroe, Louisiana that is internationally known for the many innovative childrens' and baby products that it has designed, popularized, and sold worldwide. Upon learning that Petitioner Insta-Mix was selling unauthorized copies of Luv n' care's original "flip top" design for no-spill drinking cups, Luv n' care instituted suit in the Monroe Division of the U.S. District Court for the Western District of Louisiana to redress the violation of its intellectual property rights.

In the District Court, Insta-Mix moved to dismiss for lack of personal jurisdiction, alleging that it had never done any business in Louisiana and had no contacts with Louisiana. As a result, it contended that a suit in a Louisiana forum would violate constitutional due process.

Subsequent jurisdictional discovery demonstrated that Wal-Mart had electronically transmitted dozens of purchase orders to Insta-Mix, seeking products for Wal-Mart's Louisiana stores.

In response to those orders, Insta-Mix shipped accused products[1] to Wal-Mart on sixty seven[2] separate occasions. Products were directly shipped from Insta-Mix's Colorado warehouse to the Wal-Mart distribution center in Opelousas, Louisiana responsible for servicing Wal-Mart's Louisiana retail stores.[3]

These shipments by Insta-Mix to Louisiana were conducted on a virtually weekly basis for nearly two years.[4]

1. Insta-Mix's claim that Wal-Mart (not Insta-Mix) shipped the products to Louisiana is misleading. Pet. 4. At the Insta-Mix warehouse, Insta-Mix provided the goods to various shippers (including independent carriers such as the United Parcel Service) for delivery to Wal-Mart's Opelousas, Louisiana distribution center. This is not disputed. However, to avoid the consequences of its actions, Insta-Mix attempted to recast this as 'shipment by Wal-Mart'. To do so, it alleged ignorance of the product destination to try to nullify the importance of electronic notice, and relied upon an F.O.B. term in the vendor agreement regarding passage of title. The Fifth Circuit properly rejected Insta-Mix's claims as implausible and irrelevant. App. 7 - 9.

2. The Fifth Circuit's decision indicates that there were "approximately sixty five" shipments (App. 2) due to the fact that jurisdictional discovery demonstrated the presence of sixty seven shipments, though Insta-Mix was only able to locate invoices for sixty four of them. However, Insta-Mix did not dispute that sixty seven orders had been placed and filled.

3. Wal-Mart maintains a series of distribution centers nationwide. A party selling product to Wal-Mart ships products to the appropriate distribution center for the stores in the desired geographic region.

4. In addition to Wal-Mart, Insta-Mix sold to chains such as Burlington and the Army/Navy Exchange, both of which are nationwide entities and could have potentially sold within Louisiana. Though Insta-Mix was directed to provide information regarding those sales, no response was provided. It was also learned during jurisdictional discovery that Insta-Mix had shipped small numbers of other products (not the subject of this lawsuit) to Louisiana as well.

The products were shipped using common carriers, including independent shippers such as United Parcel Service (UPS). Almost two hundred thousand units of accused product were introduced into the stream of commerce nationwide, including at least 3,696 products shipped to Louisiana.[5]

The District Court dismissed, adopting the Magistrate's Recommendation and Report. App. 19-27. On appeal, the Fifth Circuit reversed, holding that Insta-Mix had purposefully availed itself of the Louisiana market for the accused product, that the underlying cause of action arose out of Insta-Mix's contacts with the forum, and that the exercise of jurisdiction would be fair and reasonable. App. 5, *et seq.* In a special concurrence, Circuit Judge DeMoss acknowledged being bound by controlling Fifth Circuit precedent, but asserted that this case "deepens the divide" between those circuits requiring "additional conduct" and those that do not *post-Asahi*, and requested that this Court take up and resolve the minimum contacts issue. App. 17. Insta-Mix then filed for a petition for a writ of certiorari, which Respondent opposes herein as set forth below.

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5. Insta-Mix's accused products included a first generation copy of Luv n' care's top, followed by an even closer second generation copy. The second generation version is virtually indistinguishable from Luv n' care's, and was created when the initial imitation was not sufficiently successful. Based on Insta-Mix's records provided to date (which were not complete, *see*, *supra* n.4), at least 194,058 units of accused first and second generation products were distributed nationwide. Insta-Mix has tried to reduce its exposure by claiming that only the second version is similar to Luv n' care's. Based on the incomplete records it has provided, it has sold at least 82,224 units of the second generation product.

REASONS FOR DENYING THE PETITION

I. The Fifth Circuit's Decision Is Well Grounded In Precedent Prior to the *Asahi* Pluralities

As interpreted by this Court, specific jurisdiction fulfills due process when: (1) the defendant has "minimum contacts" with the forum; and (2) exercise of jurisdiction would not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158 (1945). Insta-Mix petitions here on the basis of a post-*Asahi* split between those circuits that have adopted Justice Brennan's approach ("stream of commerce"), and those that have adopted Justice O' Connor's approach ("stream of commerce plus"), to assess the minimum contacts question. *Asahi Metal Industry Co. Ltd. v. Superior Court*, 480 U.S. 102, 107 S. Ct. 1026 (1987).[6] However, case law prior to and independent of *Asahi* fully supports the Fifth Circuit's decision.

As this Court stated in *World-Wide Volkswagen*, if the sales of product are not an isolated occurrence, but arise from a party's efforts to directly or indirectly serve the market for its products in other States, it is not unreasonable to subject that party to suit in one of those States. *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 297-298, 100 S. Ct. 559, 567 (1980). This was the very situation presented by Insta-Mix's activities.

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6. The *Asahi* Court produced three separate plurality opinions, authored by Justice Brennan, Justice O'Connor, and Justice Stevens. Justice Brennan's "stream of commerce" plurality and Justice O'Connor's "stream of commerce plus" plurality each took different views on the requirements for minimum contacts under *International Shoe* and subsequent precedent such as *World-Wide Volkswagen*. Justice Stevens' opinion found it unnecessary to reach the minimum contacts issue, holding that the fair play and substantial justice portion of the *International Shoe* test had not been satisfied.

The sales of Insta-Mix's products in Louisiana were not an isolated occurrence; they directly arose from Insta-Mix's efforts to serve the market for its products in other States, including the market in Louisiana. Insta-Mix filled dozens of orders expressly earmarked for Louisiana delivery, and many others for sale of its products throughout the country. For all of the Louisiana orders, Insta-Mix was electronically notified of the Louisiana destination in advance, and voluntarily chose to fill those orders for Wal-Mart. Having had the accused products sold in Louisiana for nearly two years, Insta-Mix served and benefitted from the market there. As a result, the Fifth Circuit correctly found that a finding of personal jurisdiction over Insta-Mix in Louisiana was within *World-Wide Volkswagen's* constitutional principles.

In light of the splintered views in *Asahi*, most other circuit courts have likewise expressly or impliedly continued to follow *World-Wide Volkswagen* in one form or another. *See* Kristin R. Baker, *Comment, Product Liability Suits and the Stream of Commerce after Asahi: World-Wide Volkswagen Is Still the Answer*, 35 Tulsa L.J. 705, 706 (2000). As a result, the split between the circuits after *Asahi* is more nominal than real.[7]

That the Fifth Circuit's decision is well supported by prior precedent is further demonstrated by this Court's majority opinion in *Burger King*. As *Burger King* reaffirmed, "the foreseeability that is critical to the due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there". *Burger King Corp. v.*

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7. In fact, after *Asahi* it is often unclear which plurality a given court is actually following, if indeed it is even following any.

Rudzewicz, 471 U.S. 462, 474, 105 S. Ct. 2174, 2183 (1985), *quoting*, *World-Wide Volkswagen*, 444 U.S. at 297, 100 S. Ct. at 567. To fulfill due process, there must be some act by which the defendant purposefully avails itself of the privilege of conducting business within the forum State, subjecting itself to its jurisdiction.[8] *Burger King*, 471 U.S. at 475, 105 S. Ct. 2174 at 2183. Here, having filled orders for Wal-Mart's Louisiana distribution center, Insta-Mix purposefully availed itself of the privilege of having its products sold within Louisiana, and should reasonably have anticipated being haled into a Louisiana court.

The purposeful availment requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts with that jurisdiction. *Burger King*, 471 U.S. at 474-475, 105 S. Ct. at 2183. But the accused goods in this case did not randomly end up in Louisiana. There was nothing unpredictable about it. Even Insta-Mix's President admitted at his deposition that it was foreseeable that Insta-Mix' products would go to Louisiana, and that it was not random or fortuitous.

The electronic notice to Insta-Mix of the desired destination and the subsequent shipments there are, consequently, more than sufficient under *Volkswagen* and *Burger King* to pass constitutional muster. For each of the requested orders, the goods were placed onto trucks for

8. Prior precedent confirms that a single purposeful contact can confer jurisdiction. *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 222, 78 S. Ct. 199 (1957). The regular and repeated activity over the course of sixty seven shipments by Insta-Mix was well beyond a sufficient single purposeful contact.

intended delivery to Louisiana, which is where they were, in fact, delivered.[9] It should not be necessary for Insta-Mix to physically visit the forum or to engage in "plus" for jurisdiction to attach. Nowadays, "it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted". *Burger King*, 471 U.S. 462, 476, 105 S. Ct. 2174, 2184 (1985). "Jurisdiction may not be avoided merely because the defendant did not physically enter the forum state." *Id.* Thus, Insta-Mix's activity was properly held to fulfill the requirement for minimum contacts.

Likewise, exercise of jurisdiction was entirely within traditional notions of fair play and substantial justice. To the contrary, it would have been unjust for Insta-Mix to benefit from the Louisiana market, and then hold that the injured Louisiana resident could not sue there. The Due Process Clause is intended to work fairness: it "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit". *World Wide Volkswagen*, 444 U.S. at 297, 100 S. Ct. at 567. Insta-Mix had every opportunity to structure its conduct. Luv n' care did not force it to fill Louisiana bound orders – it was Insta-Mix's choice to do so.

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9. *See, e.g., Ruston Gas Turbines, Inc. v. Donaldson Company, Inc.*, 9 F.3d 415, 420 (5th Cir. 1993) ("Corchran intentionally placed its products in the stream of commerce by delivering them to a shipper destined for delivery in Texas. At the time the goods left Corchran's plant in Minnesota, Corchran not only could have foreseen that the products might end up in Texas, it knew as a fact that the products were going to be delivered to a specific user in Houston, Texas.").

II. The Stream of Commerce Test Applied by the Fifth Circuit Was Entirely Sound and Need Not be Disturbed

Admittedly, the Fifth Circuit's practice is consistent with the stream of commerce test articulated in Justice Brennan's plurality, and rejects Justice O'Connor's stream of commerce plus test. App. 6-7. The Fifth Circuit has a long history of following this approach – it had done so before *Asahi* was decided, and continued to do so after the failure in *Asahi* in 1987 to achieve a majority.[10]

But, contrary to petitioner's position, the Fifth Circuit's approach is constitutionally sound. Its consistent holdings have been rooted in its effort to faithfully interpret *World-Wide Volkswagen*. App. 6. Under its interpretation (and that of Justice Brennan's plurality), it comports with due process to exercise jurisdiction over an entity that delivers products into the stream of commerce with the expectation they will be purchased by consumers in the forum State. *Id.* The present case demonstrated the logic of that position.

Petitioners complain that this approach requires any manufacturer to submit to jurisdiction in any forum anywhere. App. 11. That is incorrect. The test requires

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10. *See Oswalt v. Scripto, Inc.*, 616 F.2d 191, 199-200 (5th Cir. 1980); *Bean Dredging Corp. v. Dredge Tech. Corp.*, 744 F.2d 1081 (5th Cir. 1984); *Irving v. Owens-Corning Fiberglas Corp.*, 864 F.2d 383, 385-386 (5th Cir. 1989) (explaining that the Fifth Circuit continues to applied the stream of commerce standard described in *World-Wide Volkswagen* because the Court's splintered view of minimum contacts in *Asahi* provides no clear guidance on the issue); *Ruston Gas Turbines v. Donaldson Co.*, 9 F.3d 415, 419-420 (5th Cir. 1993). *See also, Asahi*, 480 U.S. at 111, 117 n.1 (citing *Bean Dredging*).

jurisdiction only in those product destinations that meet reasonable expectations. As Justice Brennan stated:

> [t]he stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale. As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise."

Asahi, 480 U.S. at 117, 107 S. Ct. at 1034 (Brennan, J., plurality opinion).

In contrast, the stringent stream of commerce plus type approach being urged by petitioners is a thoroughly imprudent one. Its requirement for additional activity in the forum necessitates that an almost personal relationship be shown between a party and the particular forum state. In so doing, it ignores the realities of the marketplace and unduly limits the rights of consumers and others to pursue redress where injuries occur. When a defendant causes injury in another state from the foreseeable flow of its products there, it is entirely just for it to be called to account in that state. But stream of commerce plus restricts one from doing so.

As commentators have recognized, such restriction of jurisdiction in the modern era is unwise. "[G]iven the increasing ease with which products move in international commerce, narrowing the reach of U.S. courts is a step in the 'wrong direction.'". Connie M. Ericson, *Casenote: CMMC v. Salinas: The Texas Long-Arm Statute Does Not Reach French Equipment Manufacturer (But Maybe it*

Should), 20 Hous. J. Int'l L. 493, 511-512 (1998). The more likely it is that consumers and workers will be affected by products distributed throughout the United States by third parties, the less fair it is to those consumers and workers to limit their ability to hold the manufacturer accountable for its products when they cause injury. *Id.*

In his special concurrence here, Fifth Circuit Judge DeMoss indicated that he would have followed the Fourth Circuit's view in *Lesnick* had he not been constrained by his circuit's precedent. App. 16; *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939 (1994). In *Lesnick*, the Fourth Circuit began by reading *World-Wide Volkswagen* and *Asahi* as teaching that the touchstone of the minimum contacts analysis is a determination of whether the out-of-state person had engaged in some activity purposefully directed toward the forum state. *Lesnick*, 35 F.3d at 945. That purposeful activity is present here.

However, *Lesnick* proceeded to then further require additional conduct as per Justice O'Connor's *Asahi* plurality. *Lesnick*, 35 F.3d at 945-946. Accordingly, Judge DeMoss stated that under this case's facts, jurisdiction would not have attached in a stream of commerce plus court, such as the Fourth Circuit.

Yet, if that is true, it only demonstrates the flaws in the stream of commerce plus test, not the flaws in stream of commerce. Petitioner engaged for nearly two years in regular, ongoing, sales of products intended for delivery to Louisiana. To the extent that a stream of commerce plus approach would be powerless to afford jurisdiction in Louisiana, it is extremely ill-advised. When a corporation places a product into the stream of commerce with knowledge of where that

product is going, that company should be held accountable when the product causes injury there. *See, e.g.*, Lori Elizabeth Jones, *Note, Lesnick v. Hollingsworth & Vose Co. – The Pure Stream of Commerce No Longer Flows Through the Fourth Circuit*, 29 U. Rich. L. Rev. 421 (1995) (criticizing the Fourth Circuit's adoption of stream of commerce plus and urging adoption of Justice Brennan's stream of commerce approach).

Moreover, to require something beyond stream of commerce requirements is inconsistent with this Court's precedent. *See, e.g., Dehmlow v. Austin Fireworks*, 963 F.2d 941, 946 (7th Cir. 1992) ("Because the Supreme Court established the stream of commerce theory, and a majority of the court has not yet rejected it, we consider that theory to be determinative. We may not depart from Court precedent on the basis of a belief that present Supreme Court Justices would not readily agree with past Court decisions", *citing, Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 109 S. Ct. 1917, 1921-1922 (1989)). To the extent that the stream of commerce plus test would have required more, it is not constitutionally necessary.

Thus, the Eighth Circuit, for example, has been said to have retreated from earlier approval of stream of commerce plus, and since moved to a stream of commerce approach instead. *See Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610 (8th Cir. 1994); *Vandelune v. 4B Elevator Components Unlimited*, 148 F.3d 943 (8th Cir. 1998).[11] That shift has been recognized as promoting equity.

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11. Petitioner states that the subsequent cases of *Dever* and *Stanton* appear to use a stream of commerce plus approach. In *Dever*, however, the court indicated that the mere fact that Barr's products

(Cont'd)

Richard M. Elias, *Note, In Search of a Broader Stream of Commerce Theory: The Eighth Circuit Streams Past Inconsistencies in Favor of Equitable Results*, 67 Mo. L. Rev. 99 (2002); Timothy C. Lynch, *Personal Jurisdiction: Roman Candles and Bottle Rockets: The Eighth Circuit Blows up the "Stream of Commerce Plus" Analysis in Barone v. Rich Bros. Interstate Display Fireworks, Inc.*, 29 Creighton L. Rev. 1371 (1996). It also represents an ongoing evolution in the case law which may signify an eventual evaporation in the future of any nominal differences between the circuits, as the courts continue to develop responses to modern conditions.

Similarly, the growth of the Internet favors stream of commerce jurisdiction, *not* stream of commerce plus. *See, e.g.*, Christopher M. Porterfield, *Note and Comment*,

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(Cont'd)

were found in Arkansas was insufficient to support jurisdiction, and pointed out that nothing suggested that Barr had the expectation that the products would penetrate the forum market. *Dever v. Hentzen Coatings, Inc.*, 380 F.3d 1070, 1075 (8th Cir. 2004). The latter language cites *Vandelune* and *Barone* with approval, and mirrors Justice Brennan's remarks in *Asahi* regarding a defendant's expectation. *Stanton*, on the other hand, is confusing, and fails to clearly elucidate which approach it is following. *Stanton v. St. Jude Medical, Inc.*, 340 F.3d 690, 694 (8th Cir. 2003). It cites both *World-Wide Volkswagen* and the Eighth Circuit's previous stream of commerce case in *Clune* (that jurisdiction may be found where a seller uses a distribution network to deliver products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state) suggesting that it follows the stream of commerce approach. But it also cites *Asahi* for the proposition that knowledge did not constitute minimum contacts. Ultimately, it appears to have found jurisdiction lacking based on its opinion that any contacts with the forum were the result of the actions of a third party.

Which Stream to Follow: Why the Eleventh Circuit Should Adopt a Broader Stream of Commerce Theory in Light of Growing E-Commerce Markets, 20 Ga. St. U. L. Rev. 539, 562-564 (2003) (concluding that the growth of electronic commerce requires broader not narrower application of stream of commerce theory).

In the age of cyberspace, stream of commerce jurisdiction protects local plaintiffs who have claims against out-of-state and foreign companies based on Internet contacts. *Id.* The nature of those contacts are such that they do not necessarily meet any of the *Asahi* "plus" factors. Yet, a state still has a strong interest in providing redress for its injured residents based on them.

In those instances, residents often find it impractical to sue in the defendant's jurisdiction. *Id.* Resident plaintiffs also have a strong interest in avoiding the expense, inconvenience, and potential bias of a foreign defendant's jurisdiction, which generally offer plaintiffs fewer chances of recovery. *Id.* Stream of commerce provides jurisdiction while also providing fairness, since prior Supreme Court decisions already ensure that defendants will not be haled into a jurisdiction solely as a result of contacts which are 'random,' 'fortuitous,' or 'attenuated'. *Id.*

III. The Stream of Commerce Test Does Not Contravene Federalism

Circuit Judge DeMoss and those courts such as the Fourth Circuit that have raised constitutional objections to stream of commerce jurisdiction are both mistaken. Both historically, and as applied here, the stream of commerce approach does not violate principles of federalism.

To date, this Court's personal jurisdiction jurisprudence has explicated Fourteenth Amendment due process requirements since prior questions have arisen in the context of state and diversity cases. *Akro*, 45 F.3d at 1544-1545; *Honeywell*, 509 F.2d at 1143; *World-Wide Volkswagen*, 444 U.S. at 291, 100 S. Ct. at 564 (Fourteenth Amendment Due Process Clause limits the power of a state court); *Burger King*, 471 U.S. at 464, 105 S. Ct. at 2177-2178 (Fourteenth Amendment Due Process Clause as applied to diversity action)[12]; *Asahi*, 480 U.S. at 108, 107 S. Ct. at 1030 (Fourteenth Amendment Due Process Clause limits the power of a state court). However, the present action arises under a federal question. As a result, the relevant provision is the Due Process Clause of the Fifth Amendment. *Honeywell*, 509 F.2d at 1143; *Akro*, 45 F.3d at 1544-1545; *Dakota*, 946 F.2d at 1389 n.2.

In the absence of Fifth Amendment due process decisions by this Court[13], the various circuits have guided themselves by Fourteenth Amendment precedent when confronted with personal jurisdiction challenges in suits over federal

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12. In *Burger King*, any constitutional issues relating to the federal question of trademark infringement were not reached by the Court. *Burger King*, 471 U.S. at 470 n.11, 105 S. Ct. at 2181 n.11.

13. In *Omni Capital*, for example, this Court recognized that the constitutional scope of personal jurisdiction in a federal question case arises under the Fifth Amendment. However, it did not need to reach the due process issue, in view of its decision regarding service of process. *Omni Capital, Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987).

questions.[14] In that context, the circuits have adopted the minimum contacts standard elaborated in *International Shoe* and its progeny, and have applied it in federal question cases as well. *Honeywell*, 509 F.2d at 1143 (collecting cases); *Akro*, 45 F.3d at 1545; *Dakota Industries* 946 F.2d at 1389 n.2. In that vein, the Fifth Circuit likewise referred to Fourteenth Amendment principles here. App. 4.

Yet, under either the Fifth Amendment or the Fourteenth Amendment, stream of commerce jurisdiction does not

14. As the *Honeywell* court put it,

> [w]e recognize, of course, that *International Shoe* and its direct progeny reached the federal judiciary either by way of review of state court judgments or by way of diversity jurisdiction, and as a result, the holdings in those cases have been framed in terms of restraints on state power. In this litigation, on the other hand, a federally created right is at issue, and due process is properly a matter for examination in light of the Fifth Amendment rather than the Fourteenth Amendment. That is not to say, however, that the *International Shoe* line of cases is irrelevant to our inquiry here. The due process clause of the Fifth Amendment is essentially a recognition of the principles of justice and fundamental fairness in a given set of circumstances, *Galvan v. Press*, 347 U.S. 522, 530, 98 L. Ed. 911, 74 S. Ct. 737 (1954); *Aetna Insurance Company v. Hartshorn*, 477 F.2d 97, 100 (5th Cir. 1973), and, so viewed, on the facts of this case, we can perceive no operative difference between the concept of due process as applied to the states and as applied to the federal government. This and other courts have reached this result, explicitly or tacitly, and have applied the "minimum contacts" standard to federal question cases in which in personam jurisdiction was at issue, and we deem it appropriate to do so here.

Honeywell, Inc. v. Metz Apparatewerke, 509 F.2d at 1143 (collecting cases).

implicate federalism difficulties. The due process requirements of the Fifth Amendment represent a restriction on judicial power "not as a matter of sovereignty, but as a matter of individual liberty." *Omni Capital*, 484 U.S. at 104. Likewise, while due process under the Fourteenth Amendment operates to restrict state power, it is "ultimately a function of the individual liberty interest preserved by the Due Process Clause rather than as a function of federalism concerns". *Burger King*, 471 U.S. 462, 471-472 n.13, 105 S. Ct. 2174, 2181-2182 n.13, *citing*, *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-703 n.10, 102 S. Ct. 2099, 2104-2105 n.10 (1982) (internal quotes omitted).

Furthermore, even with respect to issues of sovereignty, each state has an interest in protecting the rights of its citizens. *Burger King*, 471 U.S. at 473, 105 S. Ct. at 2182 (internal quotes omitted). With respect to the out-of-state actor, the state's jurisdiction is also justified since "[a] defendant who has placed goods in the stream of commerce benefits economically from the retail sale of the final product in the forum state, and indirectly benefits from the State's laws that regulate and facilitate commercial activity." *Asahi*, 480 U.S. at 117, 107 S. Ct. at 1035 (Brennan, J., plurality opinion).

The question is, therefore, not one of sovereignty, but of choice between forums. The Fifth Circuit's choice provides that the tortfeasor, whose goods went to Louisiana, can be sued in Louisiana. This is a reasonable result: an out-of-state actor should not be permitted to send a defective or infringing products to another state, immune from jurisdiction where his acts cause damage. A state should no more have to tolerate that than be required to stand idly by while an out-of-state actor lobs live grenades across state lines.

The stream of commerce plus choice made by contrary circuits would burden the damaged resident – who remained at all times in its Louisiana home – and force it to leave its forum to sue in the tortfeasor's home territory. That choice places an undue and unjustified onus on corporations and consumers. It adds insult to injury, allowing the tortfeasor to place yet a further imposition on them.

Petitioners' approach would, thus, attempt to use federalism principles (which are not in fact violated) to protect defendants from being called to account where their products cause injury. But the Due Process Clause is not a territorial shield to enable defendants to avoid interstate obligations that have been voluntarily assumed. *Burger King*, 471 U.S. at 474, 105 S. Ct. at 2183. Here, the out-of-state petitioners' goods were sought for a Louisiana market and sent to that market; it was, therefore, within the authority of the Louisiana courts to exercise jurisdiction over their resident's cause of action. A state has a manifest interest in providing residents with a forum for redressing injuries inflicted by out-of-state actors. *Burger King*, 471 U.S. at 473, 105 S. Ct. at 2182.

CONCLUSION

As set forth above, Insta-Mix's petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

INSTA-MIX, INC., UMIX, INC., UMIXPRODUCTS, INC., UMIX SPORTS, INC., UMIXPRO, AND UMIXBABY

Petitioners

v.

LUV N' CARE, LTD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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INTRODUCTION AND SUMMARY OF ARGUMENT

In its opposition, Respondent concedes that a split exists between the circuits and states that use the "stream of commerce" test first mentioned in *dicta* in *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980) and the circuits and states that use the "stream of commerce plus" test stated in Justice O'Connor's plurality opinion in *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102 (1987). Also, Respondent did not even attempt to rebut Petitioner's argument that this case presents an ideal set of facts to use in resolving the question presented. Thus, the Court should grant the petition for *certiorari*.

Further, Respondent's argument that the correct standard is the "stream of commerce" test does not weigh against granting the petition. First, Respondent's arguments are substantively wrong. Second, even if Respondent is correct, the Court should still grant the petition because, under Respondent's theory, the states and circuits that use "stream of commerce plus" are not properly exercising personal jurisdiction. Thus, the Court should grant the petition to ensure a single nation-wide standard for personal jurisdiction.

Finally, Respondent's argument that Judge DeMoss and other judges are incorrect in finding federalism problems with the "stream of commerce" test is wrong. Respondent's argument is based on a one-sided weighing of the rights of a plaintiff, while completely ignoring the rights of a defendant.[1] Thus the Court should also grant the petition to resolve the federalism issues.

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[1] Respondent's argument that this case should be analyzed under the Due Process clause of the Fifth Amendment is misleading and irrelevant. *See* Section IV *infra*.

ARGUMENT

I. Petitioner's Argument that There is a Split in State and Federal Courts Regarding the Proper Test for Personal Jurisdiction Stands Unrebutted

Respondent acknowledges the circuit split regarding this important jurisdictional issue. Nevertheless, Respondent argues that most circuit courts have expressly or implicitly followed the stream of commerce test due to the "splintered" views in *Asahi*. Opp. Br. at 5 (*citing* Kristin R. Baker, Comment: *Product Liability Suits and the Stream of Commerce After Asahi: World-Wide Volkswagen Is Still the Answer*, 35 Tulsa L.J. 705, 706 (2000)). But Respondent's argument does not stand scrutiny for at least two reasons. First, the only authority to which Respondent cites in support of its argument is a student comment that is patently inaccurate. The student comment cites to *Ruston Gas Turbines, Inc. v. Donaldson, Co.*, 9 F.3d 415, 420 (5th Cir. 1993) and *Dehmlow v. Austin Fireworks*, 963 F.2d 941, 947 (7th Cir. 1992) as support for its statement that the Fifth Circuit and the Seventh Circuit both use the "stream of commerce plus" test. Baker, 35 Tulsa L.J. 706 at n.12. But both cases actually stand for the exact opposite: that the respective circuits both use the "stream of commerce" test.[2] Second, numerous courts recognize the split in the circuits. *See, e.g., Bridgeport Music, Inc. v. Still N the Water Publ'g*, 327 F.3d 472, 479-80 (6th Cir. 2003) (recognizing the circuit split and deciding that the Sixth Circuit will use "stream of commerce plus"); *see also Commissariat a l'Energie Atomique v. Chi Mei Optoelectronics Corp.*, 395 F.3d 1315, 1321-23 (Fed. Cir. 2005) (recognizing the circuit split).

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[2] The student comment does, however, accurately point out that the First Circuit uses the "stream of commerce plus" test. *Id.* (*citing Boit v. Gar-Tec Products, Inc.*, 967 F.2d 671, 683 (1st Cir. 1992)).

Thus, Respondent's subsequent conclusion that the circuit split is "more nominal than real," Opp. Br. at 5, is flatly wrong.[3]

Similarly, Respondent's contention that the confusion within the Eighth Circuit over which standard it should use "may signify an eventual evaporation in the future on any nominal differences between the circuits," *id.* at 12, is also wrong. As Insta-Mix demonstrated in its petition,[4] the split is large and growing, with at least four circuits and fifteen states using the "stream of commerce plus" test and at least three circuits and six states using the "stream of commerce" test. *See* Pet. Br. at 6-8. Indeed, subsequent to the filing of this petition, a district court in the District of Columbia weighed in on this issue (the D.C. Circuit has not ruled on which standard to use). *Kopff v. Battaglia*, 2006 U.S. Dist. LEXIS 13638 at *16-17 (D.D.C. Mar. 29, 2006) (quoting Justice O'Conner's "stream of commerce plus" test in deciding that it lacked jurisdiction over a defendant). The Court should resolve this growing circuit split.

Moreover, even if Respondent's speculation is correct that this circuit split may somehow magically "evaporate" at some unknown future time, the Court should still grant *certiorari*. Respondent admits that "after *Asahi* it is often unclear which [*Asahi*] plurality a given court is

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[3] Indeed, the falsity of this statement is shown by Respondent's brief. Respondent admits that in many cases the existence of jurisdiction based on Internet contacts would depend on whether a court used "stream of commerce" or "stream of commerce plus." *See* Opp. Br. at 13.

[4] Petitioner Insta-Mix, Inc. ("Insta-Mix") does business or has done business in the other names in the style of the Petition (Umix, Inc., Umixproducts, Inc., Umix Sports, Inc., Umixpro, and Umixbaby).

actually following, if ***indeed it is even following any.***" Opp. Br. at 5 n.7 (emphasis added). Respondent's statement demonstrates the correctness of Judge DeMoss' statement that the test for personal jurisdiction is "in a state of complete disarray." Pet. Br. at App. 16. The Court should grant the petition because the circuit courts and state courts need the Court's guidance now on this important issue.

II. Petitioner's Argument that this Case is the Ideal Vehicle for Resolving the Question Presented Stands Unrebutted

As Insta-Mix explained in its petition, this case presents an ideal set of facts to use in deciding the constitutionality of the "stream of commerce" versus the "stream of commerce plus" tests for personal jurisdiction. As the district court found below, the ***only*** contact that Petitioner had with Louisiana regarding the products at issue was that it sold those products to Wal-Mart in Colorado, and then Wal-Mart shipped those products to its distribution centers nationwide (which included its distribution center in Louisiana).[5]

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[5] Respondent improperly attempts to reargue factual findings that the lower court resolved against it. Without a single record cite, Respondent claims that it was Petitioner, not Wal-Mart, who shipped products to Louisiana. Opp. Br. at 2 n.1. Respondent falsely claims that "[t]his is not disputed." *Id.* Not only was that disputed, but the district court explicitly made a factual finding that Petitioner's products were "picked up by Wal-Mart on its ***own truck*** or by a trucking company which ***Wal-Mart hired*** in Colorado. In other words, [***Petitioner***] ***does not ship to the distribution center in Louisiana.***" Pet. Br. at App. 25 (emphasis added). While the Fifth Circuit found it "implausible" that Petitioner did not ***know where Wal-Mart shipped the products***, it did not disturb the factual finding that ***Petitioner did not ship any products to Louisiana***. *Id.* at App. 7-8. Thus, that factual finding is not before the Court.

Thus, while it was foreseeable to Petitioner that its products would enter Louisiana, Petitioner engaged in none of the "plus" factors described in Justice O'Conner's *Asahi* plurality opinion.[6] Indeed, Respondent implicitly concedes this point as it never argues that the district court would have jurisdiction if the Court were to adopt Justice O'Conner's "stream of commerce plus" test. *See* Opp. Br. at 10.

Therefore, Petitioner's argument stands unrebutted that this case is the ideal vehicle to resolve the severe split in the circuits and state courts regarding the proper jurisdictional standard in stream of commerce cases. Thus, the Court should use this case to provide a single national personal jurisdiction standard which will provide certainty to the courts and to the countless companies that sell products into this country's stream of commerce. The petition for *certiorari* should be granted.

III. The Proper Test for Deciding Personal Jurisdiction is "Stream of Commerce Plus"

Respondent argues at length that the "stream of commerce" test is the better test for personal jurisdiction. Opp. Br. at 8-13. Respondent is in error for several reasons. First, many of the arguments Respondent makes are facially wrong. For example, Respondent argues that the "stream of commerce plus" test "necessitates that an almost personal

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[6] Consequently, this case is the classic stream of commerce personal jurisdiction case. It involves the sale of products in a state of origin, for ultimate distribution or use in the forum state by a company that believes the products may or will reach the forum state but engages in no other activities involving the forum state. Based on these facts, the Fifth Circuit found jurisdiction using the "stream of commerce" test. But, as Judge DeMoss noted, there would not be jurisdiction using the "stream of commerce plus" test because of the total absence of "plus" factors. *See* Pet. Br. at App. 17.

relationship be shown between a party and the particular forum state." *Id.* at 9. But that argument is a straw man; there is nothing in the "stream of commerce plus" test that requires a personal relationship between the defendant and a forum state. Rather, the "stream of commerce plus" test states that merely placing items into the stream of commerce is not purposeful availment of the benefits and protections of forum state laws, and thus it requires some additional act on the part of the defendant. *See* Pet. Br. at 10-11. Similarly, Respondent's claim that to "require . . . [the stream of commerce plus test] is inconsistent with this Court's precedent," Opp. Br. at 11, is also flatly wrong. Respondent failed to cite even a single case from the Court that is inconsistent with the "stream of commerce plus" test, because ***there is no such precedent.***

Second, Respondent's policy arguments in support of the "stream of commerce" test fail to address the constitutional issue involved. The question before the Court is not whether policy arguments weigh in favor of "stream of commerce" or "stream of commerce plus." Rather, the question is whether the "stream of commerce" test is constitutional when a defendant merely places items into the stream of commerce, knows that some of its products may or will end up in the forum state, but has not "purposefully avail[ed] itself of the privilege of conducting activities within the forum State." *Hanson* v. *Denckla*, 357 U.S. 235, 253 (1958).

In any event, even assuming *arguendo* that Respondent might be correct that the "stream of commerce" test is constitutional, the Court should still grant the petition. As Petitioner explained in its opening brief, with many circuits and states using the "stream of commerce plus" test and others using the "stream of commerce" test, a business has no way of knowing where it can be sued and how it

should order its affairs to avoid suit in a given jurisdiction.[7] Thus, the Court needs to resolve this issue so that there is one constitutional standard for personal jurisdiction.

IV. Only the "Stream of Commerce Plus" Test Comports with Federalism

Before addressing Petitioner's federalism argument, Respondent raises a red herring regarding which Due Process Clause applies in this case. The Fifth Circuit analyzed this case under the due process clause of the Fourteenth Amendment. *See* Pet. Br. at App. 4. Respondent argues, however, that Petitioner (and, by extension, the Fifth Circuit) is wrong in stating that the "constitutional provision implicated is the Due Process Clause of the Fourteenth Amendment." Opp. Br. at 1 (contending that because subject matter jurisdiction was based on a federal question, "the provision, at issue, is more accurately the Due Process Clause of the Fifth Amendment").

While some courts have used a Fifth Amendment analysis when subject matter jurisdiction is based on a federal question, *see, e.g., Honeywell, Inc. v. Metz Apparatewerke*, 509 F.2d 1137, 1143 (7th Cir. 1975), other courts have held that where personal jurisdiction is based on the state long-arm statute rather than a federal statute,[8] the

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[7] As the Petition explained, this conflict regarding which test to use is especially problematic in diversity cases in states that use a different test than the corresponding regional circuit uses. In those cases, the only way to know whether a court would have jurisdiction over a company would be to know the amount in controversy in advance. Pet. Br. at 9. Obviously, it is impossible for a business to know in advance how much a plaintiff is going to claim as damages before a lawsuit has been filed.

[8] Although personal jurisdiction is usually based on the long-arm statute of the state where the district court resides, there are a few instances where personal jurisdiction is created by federal statute. *See, e.g.*, 35

due process clause of the Fourteenth Amendment applies.[9] *See, e.g., Red Wing Shoe Co. v. Hockerson-Halberstadt, Inc.*, 148 F.3d 1355, 1358 n.1 (Fed. Cir. 1998) ("Because the Fourteenth Amendment constrains the reach of a state's long-arm statute, it also constrains the reach of a federal court that relies on such a statute."). Although the approach taken in *Red Wing* appears to be the better approach, it is not necessary to decide because the personal jurisdiction analysis and central issue before the Court remain the same even if the Court concludes that the correct starting point is the Fifth Amendment. Thus, as Respondent concedes, Opp. Br. at 14-15, "the question of which Due Process Clause controls the personal jurisdiction inquiry becomes purely academic." *Red Wing*, 148 F.3d at 1358 n.1.

Respondent next argues that Judge DeMoss and "other courts such as the Fourth Circuit are both mistaken" in their concerns that the "stream of commerce" test violates principles of federalism. Opp. Br. at 12. Respondent cites *Omni Capital* for the proposition that due process only addresses individual liberty interests, not ***state sovereignty*** concerns. Opp. Br. at 16. But Respondent takes that language out of context. There, the Court distinguished (non-waivable) ***judicial sovereignty*** based on subject matter jurisdiction from the due process basis for (waivable)

U.S.C. § 293 (2000) (granting personal jurisdiction to the District Court for the District of Columbia where a foreign patentee has not designated someone to receive service of process in the United States). In a case where personal jurisdiction is conferred by federal statute, only the due process clause of the Fifth Amendment would be implicated.

[9] Contrary to the implication in Respondent's brief, Opp. Br. at 14 n.13, *Omni Capital* does not address the issue of whether the Due Process Clause of the Fifth or Fourteenth Amendments applies when a district court exercises personal jurisdiction based on a state long-arm statute in a case based on a Federal question. *See, generally, Omni Capital, Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 100-104 (1987).

personal jurisdiction. *Omni Capital,* 484 U.S. at 102-04. The Court did not in any way reject the importance of federalism concerns in personal jurisdiction cases. Indeed, the language Respondent quotes from *Omni Capital* is itself a quote from *Ins. Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982), in which the Court explicitly recognized the fact that "the requirement of personal jurisdiction, as applied to state courts, reflects an element of federalism and the character of state sovereignty vis-a-vis other States." *Id.* at 703 n.10.

The problem with Respondent's argument is that it only focuses on one side of the lawsuit. It is true, as Respondent states, that "each state has an interest in protecting the rights of its citizens." Opp. Br. at 16. And certainly one of those rights is to seek redress for injury. But another equally important right is not to be haled into court in a foreign state where the citizen of the first state has not transacted business or otherwise consented to jurisdiction. Thus, in a long line of cases beginning with *Pennoyer* v. *Neff,* 95 U.S. 714 (1878) and continuing through *Int'l. Shoe Co. v. State of Washington*, 326 U.S. 310 (1945), and *World-Wide Volkswagen*, 444 U.S. 286, the Court has sought to balance the rights of the citizens of the first state to seek redress while also protecting the rights of the citizens of the second state from being haled into a state in which they have not consented to jurisdiction. Respondent's brief, like the "steam of commerce" test itself, largely ignores the rights of the citizens of the second state. Instead, it makes the rights of the citizens of the first state paramount over the rights of citizens of other states. *See* Opp. Br. at 17.

Such a one-sided weighing of rights violates the Constitution. The rights of each state's citizens must be respected, as the Court explained in *World-Wide Volkswagen*:

> [T]he Framers . . . intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State, in turn, ***implied a limitation on the sovereignty of all of its sister States*** -- a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment. . . . [Thus,] the Due Process Clause, ***acting as an instrument of interstate federalism***, may sometimes act to divest the State of its power to render a valid judgment.

444 U.S. 293-294 (emphasis added).

As explained in the petition, only the "stream of commerce plus" test complies with federalism because by requiring the defendant to take an action purposefully directed toward the forum state, it respects the unique jurisdiction of each state. Accordingly, the Court should grant the petition because as Judge DeMoss accurately stated, "the sovereignty of the individual states is on the line." Pet. Br. at App. 18.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for *certiorari* should be granted.

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No. 05-1232

IN THE
Supreme Court of the United States

INSTA-MIX, INC., UMIX, INC., UMIXPRODUCTS, INC., UMIX SPORTS, INC., UMIXPRO, AND UMIXBABY

Petitioners

v.

LUV N' CARE, LTD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR REHEARING

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On June 26, 2006, the Court denied Insta-Mix's petition for certiorari. Due to two intervening cases, Insta-Mix respectfully requests the Court to reconsider its order and grant the petition for *certiorari*.

In its petition for *certiorari*, Insta-Mix[1] demonstrated that there is a growing split between the circuits and states that use the "stream of commerce" test first mentioned in *dicta* in *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980) and the circuits and states that use the "stream of commerce plus" test stated in Justice O'Connor's plurality opinion in *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102 (1987).

In its opposition,[2] while conceding that there is a split in the circuits, Respondent contended that the split in the circuits might "eventual[ly] evaporat[e]." Opp. Br. at 12. Two cases that were decided after the final briefing on the certiorari petition demonstrate that Respondent is wrong; rather than "evaporating," the split is growing, and the confusion in the lower courts is compounding. Indeed, one of these cases was explicitly decided under the "Wal-Mart exception" that Judge DeMoss presciently described in his concurring opinion below, in which he asked the Court to grant *certiorari*. *See* Pet. Br. at App. 17. Consequently, based on these two new cases, Petitioner respectfully requests the Court to reconsider its order and grant the petition for *certiorari*.

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[1] Petitioner Insta-Mix, Inc. ("Insta-Mix") does business or has done business in the other names in the style of the Petition (Umix, Inc., Umixproducts, Inc., Umix Sports, Inc., Umixpro, and Umixbaby).

[2] On May 1, 2006, the Court requested a response from the respondent.

Kernius v. Int'l Electronics, Inc., 2006 U.S. Dist. LEXIS 41158 (D. Md. June 6, 2006),[3] is a patent infringement suit where a defendant had moved to dismiss for lack of personal jurisdiction. In particular, one of the defendants claimed the lower court lacked jurisdiction because the defendant only sold its products to national retailers, such as Wal-Mart, who sold the products within the jurisdiction.

The district court noted that while the Fourth Circuit uses the "stream of commerce plus" test, the Federal Circuit has refused to decide whether to use "stream of commerce" or "stream of commerce plus." *Id.* at *11-12, n.2. The district court then found jurisdiction using the "stream of commerce" test[4] based solely on the fact that the defendant placed its articles into the stream of commerce by selling to Wal-Mart and other national retailers.[5] *Id.* at *14-15. The district court then went on to demonstrate the disarray that exists in the lower courts by stating that *Asahi's* "stream of commerce plus" test is also met by "the undisputed facts . . . that [the defendant's] devices are placed in the stream of commerce through established distribution channels." *Id.* at *12 n.2. But placing devices into the "stream of commerce [by] established distribution channels" does ***not*** meet the

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[3] The Reply Brief for the Petitioner was printed in the morning on June 6, 2006, and filed in the early afternoon. *Kernius* was not available in any electronic data base until some time after its filing date of June 6, 2006.

[4] Consequently, if *Kernius* was not a patent case and was appealable to the Fourth Circuit rather than the Federal Circuit, the lower court should have used the "stream of commerce plus" test rather than the "stream of commerce" test.

[5] *Kermius* demonstrates the prescience of Judge DeMoss' concurrence that the "stream of commerce" test violates due process by carving out a "Wal-Mart exception" for national jurisdiction. *See* Pet. Br. at App. 17.

"stream of commerce plus" test; rather, that action, by definition, only meets the "stream of commerce" test.

The confusion in the lower courts is further shown by *Burman v. Phoenix Worldwide Indus., Inc.*, 2006 U.S. Dist. LEXIS 46070 (D.D.C. July 7, 2006). In *Burman*, the district court began its analysis using the "***stream of commerce***" test. *Id.* at *13, n.4. But then it found "the stream of commerce doctrine inapplicable" based on the ***"stream of commerce plus"*** test because, *inter alia*, the plaintiff had failed to show "***additional conduct***" by the defendant that "indicates an intent or purpose to serve the market in the forum state." *Id.* (emphasis added) (*quoting* Justice O'Connor's *Asahi's* plurality opinion at 480 U.S. 112). Such additional conduct is only required under the "stream of commerce plus" test, not the "stream of commerce" test.

Thus, in *Kernius*, the lower court found the "***stream of commerce plus***" test met ***where the defendant engaged in no additional conduct*** beyond placing an article into the stream of commerce. Conversely, in *Burman*, the lower court found the "***stream of commerce***" test not met, based on the defendant's ***lack of "additional conduct."*** Both of these cases were decided incorrectly based on the standards the courts were using, and demonstrate the correctness of Judge DeMoss' statement that the test for personal jurisdiction is "in a state of complete disarray." Pet. Br. at App. 16. The Court should grant the petition for *certiorari* to eliminate the disarray and confusion in the lower courts regarding the "stream of commerce" and "stream of commerce plus" tests for personal jurisdiction.

For the foregoing reasons, and those stated in the petition and the reply brief of the petitioners, the Court should grant the petition for rehearing and grant the petition for *certiorari*.

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July 21, 2006

STATEMENT PURSUANT TO RULE 44(2)

I, Robert C. Nissen, hereby certify that the attached Petition for Rehearing is restricted to the grounds listed in Rule 44(2) and that it is presented in good faith and not for purposes of delay.

July 20, 2006

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